



## **Legal Studies Research Paper Series**

**Research Paper No. 08-071**

**September 2008**

### **COMPARATIVE LEGAL STUDIES AND THE MATTER OF AUTHENTICITY**

**Pierre Legrand**

This paper can be downloaded without charge from the  
Social Science Research Network Electronic Paper Collection:  
<http://ssrn.com/abstract=1259920>

# Comparative Legal Studies and the Matter of Authenticity

---

PIERRE LEGRAND \*

Insisting so on difference, made me welcome:  
Once that was recognised, we were in touch[.]

Philip Larkin<sup>1</sup>

I Premises

II Culture, Then

III Selected Aspects of Comparative Orthodoxy (Such as Truth)

IV The Orthodoxy Applied, Recently and Prominently

V Critique (Part One)

VI Critique (Part Two)

VII Working Towards Another 'Model'

\* Of the Editorial Board; Professor of Law and Director of Postgraduate Comparative Legal Studies, Université Panthéon-Sorbonne; University Professor, University of San Diego Law School; Senior Fellow, University of Melbourne School of Law; Distinguished Visitor, Faculty of Law, University of Toronto. This text developed out of interventions at the University of Melbourne School of Law (20 October 2004); at the London School of Economics and Political Science (12 and 19 January 2005); at the Centre for Commercial Law Studies, Queen Mary, University of London (24 June 2005); at the Cornell Law School Summer Institute of International and Comparative Law in Paris (14 July 2005); at the University of California at Los Angeles School of Law (23 September 2005); and at the Faculty of Law, University of Toronto (17 January 2006). I am deeply indebted to Tim Lindsey; Igor Stramignoni; Nick Foster; Mitchel Lasser and Annelise Riles; Maximo Langer; and Dean Mayo Moran for providing me with such crucial opportunities to present and enrich the argument. I am also very grateful to Michael Ramsey, whose research prompted my interest in the US Supreme Court decision that I address in part IV of the paper, and to Mitchel Lasser, who selflessly helped to fashion the thesis that I defend with reference to this case envisaged from a comparative perspective. Anyone at all familiar with French universities will readily appreciate how privileged I feel to have been able to benefit from the extensive range of material facilities put at my disposal at the University of San Diego Law School. I wish to thank (Dean) Daniel Rodriguez and Dean Kevin Cole for their generous hospitality and unwavering support. Unless otherwise indicated, translations are mine. Needless to say, the usual disclaimer applies. This paper is for Casimir and Imogene, peregrine inquirers too.

<sup>1</sup> Larkin, P (1988) [1955] 'The Importance of Elsewhere' in *Collected Poems* Marvell Press and Faber at 104.

I PREMISES

*Every other is every bit an other.*

Jacques Derrida<sup>2</sup>

[L]aw is local knowledge not placeless principle [...]. [A] comparative approach to law becomes an attempt [...] to formulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another. [...] This is, of course, like Englishing Dante or demathematizing quantum theory for general consumption, an imperfect enterprise, approximate and makeshift [...]. But, aside from resigning ourselves to the fixity of our own horizons or retreating into mindless wonder at fabulous objects, it is all there is, and it has its uses.

Clifford Geertz<sup>3</sup>

In Iris Murdoch's *The Nice and the Good*, an elderly gentleman, Uncle Theo, sits with his twin niece and nephew while they play on the seashore. The beach is a source of acute discomfort to Uncle Theo. Although the children's noise and exuberance bother him, what makes Uncle Theo most anxious is the manifold variety of things. As if twinness were not enough of an ontological disturbance, there are all those pebbles on the beach. Since each pebble clamours in its particularity, the totality of them threatens the intelligibility and the manageability of the world. Uncle Theo is a man who can only negotiate the possibility of plurality if the many can be reduced to a few or, best of all, to one; while the twins display a childlike delight in variety, he exhibits a plethoraphobic distaste for multiplicity and randomness. His preoccupation with perceptual and conceptual tidiness shows Uncle Theo as the typical comparatist-at-law, that is, as someone who is dismayed and disturbed by difference, who *wishes it away*.<sup>4</sup>

As surprising as it may seem, given that one would expect comparatists to be readily extolling the value of diversity, orthodox (etymologically, the 'right' or 'correct' or 'true') comparative legal studies, confusing the legitimate desire to overcome barriers of communication with the relegation of cognitive asymmetries across laws to ignorable differences, has been written, and continues to be written, from Uncle Theo's theocratic point of view: commonalities *envers et contre tout* purporting to lead, ultimately, to oneness, that is, to a single law transcending (ie, standing above) local laws somehow regarded as an impediment to progress.<sup>5</sup>

Engaging in hubristic programmes that engender a hasty and frenetic search for commonalities-which-clearly-must-be-there-since-we-want-them-there, 'the comparati[st]

<sup>2</sup> Derrida, J (1999) *Donner la mort* Galilée at 98 ['Tout autre est tout autre'] (emphasis original).

<sup>3</sup> Geertz, C (1983) *Local Knowledge* Basic Books at 218-19.

<sup>4</sup> Murdoch, I (2000) [1968] *The Nice and the Good* Vintage 152-53. I follow closely Spelman, EV (1988) *Inessential Woman* The Women's Press at 1-2.

<sup>5</sup> The idea of a 'higher' law suggests a brand of transcendentalisation that I will style 'celestial' — as opposed to 'tellurian' (on which, see below, note 141). For a general exploration of the problematic relationship that orthodox comparatists-at-law have evinced as regards the matter of diversity, see Legrand, P (2003) 'The Same and the Different' in Legrand, P and Munday, R (ed) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 240-311.

presumes similarities between different jurisdictions in the very act of searching for them'.<sup>6</sup> Now, the 'sameness' across different laws that comparative research postulates is *necessarily* based on the repression and exclusion of pertinent differences located in the matrix within which any manifestation of posited law is inevitably ensconced. In sum, the specification of 'sameness' can only be achieved if the epistemological dimensions of the law are artificially excluded from the analytical framework. Accordingly, the creation and maintenance of homogeneity across a range of posited laws must be regarded as a demonstrably violent enterprise. Only something like forcible interpretive closure can effectively claim that different manifestations of life-in-the-law constitute a non-conflictual and harmonious ensemble once they have been artificially reduced to 'sameness'.

Indeed, for the 'sameness' thesis to hold, its proponents must be prepared to pretend that the problems that the law addresses, and the solutions that the law provides to these problems, are somehow unconnected to the environment from which the problems and solutions arise. In other words, the 'sameness' thesis compels one to regard problems and their legal treatment as occurring in a vacuum. Only if one is willing to ignore the embeddedness of the law may one say that a problem and its treatment by the law can be considered irrespective of space or time. What is unclear is whether the defenders of 'sameness' take the view that, unlike art or literature, law is somehow completely disconnected from the society (or the polity or the economy or the tradition or the language) by which it is produced, or whether they accept that law necessarily partakes in the *culture* from which it emanates, but prefer to close their eyes to this fact, leaving the matter to linguists, historians, or other such 'marginal' figures to consider. In either case, the 'sameness' approach perpetuates a brand of 'rightwing Hegelianism [which] conceals a stark downgrading of historical contingency and human freedom'.<sup>7</sup>

As long as it remains driven by the entrenched urge to confine its analytical framework to the identification of 'sameness' in the formulation of statutes or the outcome of judicial decisions across jurisdictions, comparative legal studies has little to offer legal theory other than the pseudoscientific respectability connected with institutional fetishism. In fact, this brand of comparative research is positively misleading in the way it propounds the presence of commonalities across legal 'systems' which can exist solely at the most superficial level and are therefore devoid of epistemological value. For example, the matrix of associative context that energises usage in any given law can be replicated into another law only partly, and only by virtue of periphrastic and metaphrastic manoeuvres which — not unlike the translation of a poem — downgrade the intensity, the evocative means, the formal autonomy of the original.<sup>8</sup> This is why any purportedly 'universal' grammar of law is fatally, and damagingly, reductionist. This is why every uniformising ideology intent on sweeping away undesirable elements can legitimately appear terrifying, no matter how chaste it sounds.

The lifeworld of the law demands not the abolition of difference, but the deft management of cultural heteronomies, the assumption of pluralism, the acceptance of a coexistence of non-harmonised rationalities, and the steady practice of a politics of inclusion

<sup>6</sup> Vining, J (1986) *The Authoritative and the Authoritarian* University of Chicago Press at 65.

<sup>7</sup> Unger, RM (1996) *What Should Legal Analysis Become?* Verso at 9. See also *id* at 72-73 and 76-77.

<sup>8</sup> See Legrand, P (2001) 'What "Legal Transplants"?' in Nelken, D and Feest, J (ed) *Adapting Legal Cultures* Hart at 55-70.

to enlarge the possibility of intelligible discourse between laws. In short, difference must be understood and the temptation to efface it resisted.<sup>9</sup>

In appreciation of the fact that comparative analysis of law is a serious political act — does it not ascertain the other for me and inscribe him, to the point where what I write becomes an aspect of the other's legal identity? — comparatists must resist the powerful drive towards the construction of abstract commonalities (Vico observed that 'the human mind naturally tends to delight in the uniform') and acknowledge the ineliminability of difference which, as witnesses, it becomes their responsibility to characterise, articulate, and justify.<sup>10</sup> The goal must be to redeem local knowledge, best described in terms of its plasticity, pliability, diversity, and adaptability.

Disclaiming any objectivity (and therefore bringing to bear their own prejudices as situated observers),<sup>11</sup> comparatists-at-law must purposefully stress the identification of differences across the laws they compare, lest they fail to address singularity's authenticity.

No information can be deemed irrelevant to the comparatist as he undertakes to come to terms with foreign law. Even the fantasies sustained by a culture are a valuable clue for coming to know that culture;<sup>12</sup> the energies directed towards imagination, projection, and a sense of idealised community also tell a story.

The more one proceeds with the comparative task, the more one ought to find oneself enmeshed in an experience of irreducibly complex, singular forms of life-in-the-law. The more reflective and self-critical the process of understanding another law becomes, the more differential the comparatist's account proves to be.

To insist on difference as a value, to militate in favour of the respect, recognition, and implementation of difference in all its complex ramifications, is not to subvert the Enlightenment commitments to human emancipation and liberty, and it is not a fortiori to favour a return to a pre-Enlightenment cast of mind which denied parity for all before the law and stressed exclusion based on status. Nor is it to promote indifferentist, exclusionary, or heterophobic relativism premised on the essence of community. Nor is it to display pessimism. Nor is it to militate against change.

<sup>9</sup> The literature around the theme of 'difference' is vast, especially if one encompasses the work of precursors such as Søren Kierkegaard or of exceptional thinkers like Emmanuel Levinas and Luce Irigaray. Indeed, the writing of Jacques Derrida, who can legitimately be regarded as the most insightful and influential contemporary proponent of differential thought, is, in and of itself, immense. Helpful (if occasionally difficult) introductions to the thought of difference include Gasché, R (1994) *Inventions of Difference* Harvard University Press; Bell, JA (1998) *The Problem of Difference* University of Toronto Press; Currie, M (2004) *Difference* Routledge; Easthope, A (2002) *Privileging Difference* Belsey, C (ed) Palgrave; de Solà-Morales, I (1997) *Differences* Whiting, S (ed) and Thompson, G (trans) MIT Press; Young, IM (1990) *Justice and the Politics of Difference* Princeton University Press; Moyn, S (2005) *Origins of the Other* Cornell University Press; Wieviorka, M (2001) *La différence* Balland; Meyer, M (2000) *Petite métaphysique de la différence* Le Livre de Poche.

<sup>10</sup> Vico, G (2001) [1744] *New Science* Marsh, D (ed and trans) Penguin bk I, sec 2, no 47 at 92. I have modified the translation slightly. For the original text, see id (1953) *Principi di scienza nuova* in *Opere* Nicolini, F (ed) Riccardo Ricciardi at 452 [*La mente umana è naturalmente portata a dilettersi dell'uniforme*].

<sup>11</sup> These prejudices would include 'theoretical and axiological presuppositions about [the material upon which he bases his comparisons]' and 'symbolic-emotional' apprehensions: Crapanzano, V (1992) *Hermes' Dilemma and Hamlet's Desire* Harvard University Press at 144.

<sup>12</sup> See Huizinga, J (1996) [1919] *The Autumn of the Middle Ages* Payton, RJ and Mammitzsch, U (trans) University of Chicago Press at 62. Cf Rosaldo, R (1993) *Culture and Truth* Beacon Press at 25: 'Human imaginations are as culturally formed as distinctive ways of weaving'.

Given that the diversity of laws and the variety of forms of life-in-the-law they embody remain the expression of the human capacity for choice and self-creation, I seek, as comparatist-at-law, affirmatively to encourage contrarian discourse in the face of a totalitarian rationality established by established comparative legal studies which, while claiming to pursue the ideal of impartiality by reducing differences in the lifeworld of the law to calculative and instrumental unity, effectively privileges a situated standpoint — that favouring logocentrism and regulation, that pursuing methodological systematisation and scientificisation, that seeking to elicit through ever-increasing technological standardisation of law the kind of epigrammatic answers from foreign laws valued by practitioners and lawmakers — which it allows to project as universal. I contend that this exercise must be apprehended as the enforced, violent, fiction that it is, and that one must accept therefore that a ‘harmonisation’ can only prove persuasive if it will work *through* difference rather than against it, by acknowledging as meaningful each law’s characteristic discursive formation.

Instead of aiming to reconcile all laws in the name of ‘rational’ consensus, of worshipping at the altar of universalism, comparatists-at-law must foster a vibrant public sphere of contestation where different legal projects can be confronted. The specificity of comparative legal studies does not lie in overcoming the ‘we’/ ‘they’ distinction, but in drawing it in a way compatible with the recognition of pluralism, that is, in acknowledging that the ‘they’ represents the condition for the affirmative possibility of a ‘we’ (which, in other words, can only exist through its demarcation from an *alterior* ‘they’).<sup>13</sup>

What is required in an age of globalisation is not so much yet more technical knowledge about what a foreign law says on any given point at any given time, for one can relatively easily consult an encyclopaedia or enlist the help of a foreign lawyer to ascertain such rudimentary data. Beyond technical clarity in problem-solving, there is an urgent need to understand how foreign legal communities think about the law, why they think about the law as they do, why they would find it difficult to think about the law in any other way, and *how their thought differs from ours*.

Insensitivity to questions of legal heterogeneity fails to do justice to the situated, local properties of knowledge, which are no less powerful because they may remain inchoate and uninstitutionalised. In the way it obdurately refuses to address plurijurality at the deep level, the rhetoric of comparative legal studies simply deprives itself of epistemological validity. It deserts serious thought for earnest prostration before the instrumentalist sabotage of cognition.

The other always exceeds the idea of the other in me, the other is ultimately independent of my initiative and power, the other interrupts the self on a primordial level. In this sense, the other assumes *priority* over the self.<sup>14</sup> The precedence of alterity arising from this structural asymmetry provides the ethical norm and imperative for comparative legal studies as well as the criterion of practical decision for comparatists.

<sup>13</sup> Cf Lotman, YM (2001) *Universe of the Mind* Shukman, A (trans) IB Tauris at 142: ‘Since [...] there can be no “us” if there is no “them”, culture creates not only its own type of internal organization but also its own type of external “disorganization”’.

<sup>14</sup> The work of Levinas is particularly helpful with respect to the claims of otherness on selfhood. See, eg, Levinas, E [1971] *Totalité et infini* Le Livre de Poche at 39-45.

The condition of the comparatist is primordially being-towards-another-law such that the notion of 'relation' must lie at the heart of any comparative endeavour. Now, we know that '[relation] secures the difference of things, their singularity'.<sup>15</sup>

Only in deferring to the non-identical, to *what is the case in advance of any theoretical elaboration*, can the claim to *justice* be redeemed.

Coming to the matter of 'sameness' as comparatist — and, therefore, as someone who values diversity as a good and who is prepared to affirm it as a good (although not as a good that will always trump other goods)<sup>16</sup> — I can only resist the drive towards uniformity by emphasising, explaining, and justifying singularity, that is, by incessantly reiterating the existence of discrepant epistemological reservoirs of ideas which between them allow communities and individuals to recognise the legal-cultural forms inscribed over the long term that resonate with their sense of identity (including spheres of 'alternative' law that have deliberately fashioned themselves as legitimate modes of conflict resolution). To borrow from Peter Goodrich, I can only be concerned with 'the historical and ontological issue of how law is lived, what are its habitual forms, what is the deep structure that allows its repetition in ever different forms'.<sup>17</sup>

Differential thinking is characterised by its thorough immanence to actualised, real, and, therefore, discontinuous experience, such that if difference is denied, it is life and existence themselves that are denied. Differential thinking thus attests to 'a gnawing sense of unfulfilledness, [an] endemic dissatisfaction with itself'. It is 'haunted by the suspicion' that it is never differential *enough*.<sup>18</sup>

Comparative legal studies must be a practice animated by the conviction that any encounter worth the name must assume encountering the other in all of the other's singularity and recognising this singularity (which, of course, requires wrenching it from a minimal horizon of non-singular intelligibility in the first place, if only because appearance of identity is inherent in thought itself). The idea, therefore, is for cognition to bow to concretion, the goal is to move judgment from received certainties to disturbing experiences, that is, from a cognitive to a re-cognitive ground which, since it implies an acknowledgement (in the sense of giving one the recognition that is solicited and deserved, or in the related sense of giving a speaker a voice about his mapping of his law-world),<sup>19</sup> is also an ethical, political, and hermeneutical ground.<sup>20</sup> I need not even argue that legal pluralism is inherently good. It is enough for me to say that legal cultures, and the diversity of forms of life-in-the-law they embody, remain the expression of the human capacity for choice and self-creation and, as such, deserve to be respected as incorporating

<sup>15</sup> Gasché, R (1999) *Of Minimal Things* Stanford University Press at 10.

<sup>16</sup> Thus, 'Incoterms', I am reliably assured, work very well. The word refers to 13 labels (such as 'FOB', 'CIF', etc) adopted under the auspices of the International Chamber of Commerce. I thank Professor Jacob Ziegel for supplying this illustration which shows how 'uniformisation' of law can be valuable — an argument that I readily accept. Why, then, my qualified reference to uniformisation? Because Incoterms — yes, Incoterms! — as they are implemented by merchants, lawyers, arbitrators, and judges generate, on each and every occasion, an original configuration. The originality may be slight, but it is always present even in what seems most familiar.

<sup>17</sup> Goodrich, P (1990) *Languages of Law* Weidenfeld and Nicolson at 2.

<sup>18</sup> I adopt and adapt Bauman, Z (1993) *Postmodern Ethics* Blackwell at 80.

<sup>19</sup> 'Neither the concreteness nor the otherness of the "concrete other" can be known in the absence of the *voice of the other*': Benhabib, S (1992) *Situating the Self* Polity at 168 [emphasis original].

<sup>20</sup> Aspects of the dynamics between politics and hermeneutics are canvassed in Rosen, S (1987) *Hermeneutics as Politics* Oxford University Press.

a vital aspect of social existence which helps to define selfhood. Legal communities and individuals within these communities deserve to be given their historical due. They are entitled to deep-level *recognition* — a recognition that must extend to particularities.<sup>21</sup> But, '[i]n order for the recognition of the other to be possible, there must first be respect for the other'.<sup>22</sup>

The comparison that takes place cannot be regarded as the coming into contact of two neutral terms, 'them' and 'us', as too many comparatists apparently assume. Rather, the comparison takes place asymmetrically between 'them' and 'us speaking of them'. The equality is broken. The self is, ultimately, different from the other that is different — who remains entitled to refuse derivation from self.<sup>23</sup>

Only if it is prepared to move beyond the juxtaposition of substantive and adjectival posited law, if it is willing to overcome its seemingly obsessional urge to suppress difference across laws, and if it accepts that when one researches the law, when one reads a statute or a judicial decision with full response, one is implicated in a matrix of inexhaustible specificity, can comparative research about law meaningfully influence the ongoing conversation concerning diffusion of law (and 'convergence' of laws in particular).

Leaving the technical updates to practitioners specialising in a given foreign law, comparative legal studies can best be effectuated by securing pertinent anthropological, sociological, philosophical, historical, and psychological insights. Indeed, I claim that the comparatist can only account in a meaningful way for how the law is constructed in a foreign jurisdiction through an interdisciplinary investigation. Legal artifacts are incorporative cultural forms which cannot be significantly detached from the world of meanings that fashions a law-world. As compactly allusive accretions of cultural elements, of traditional features, they are supported by impressive historical formations. They are the expression of an assumptive background: for example, they convey morally and politically resonant ascriptions. Any manifestation of posited law thus exists as the unknowing articulator or vector of a cultural sensibility which, while it is actually inscribed in the textual fragments themselves, requires the comparatist's ampliative acts of interpretation to come to light. It exists in a larger cognitive framework: the comparatist must therefore apprehend it as being more than a short-lived event with a clearly ascertainable beginning and an identifiable end and relate it to other, whether prior or concurrent, legal-cultural phenomena in a way that will make the particular enunciation look less like an arbitrary incident and more akin to the expression of a coherent and intelligible pattern.

The realisation that legal discourse can never fully transcend the manifestations of localism including the historicity of law, the appreciation that there is no non-epistemic

<sup>21</sup> For a leading argument in favour of 'recognition', see Taylor, C (1994) 'The Politics of Recognition' in Gutmann, A (ed) *Multiculturalism* Princeton University Press at 25-73. Taylor's claim is the object of a thoughtful critique in Markell, P (2003) *Bound by Recognition* Princeton University Press. For a historical and philosophical framework, see Williams, RR (1998) *Hegel's Ethics of Recognition* University of California Press. See also Düttmann, AG (2000) *Between Cultures* Woodgate, KB (trans) Verso. See also Kain, P (2005) *Hegel and the Other* SUNY Press.

<sup>22</sup> Hamacher, W (1997) 'One 2 Many Multiculturalisms' in de Vries, H and Weber, S (ed) *Violence, Identity, and Self-Determination* Stanford University Press at 323.

<sup>23</sup> See Bhabha, HK (1994) *The Location of Culture* Routledge at 31: 'the Other text is forever the exegetical horizon of difference, never the active agent of articulation'. See also Kilani, M (1994) *L'invention de l'autre* Payot at 20-21. For parallel conclusions by a leading philosopher having devoted much of his work to alterity, see Levinas, E (1983) *Le temps et l'autre* Presses Universitaires de France at 75, where the author notes that the relationship between self and other is 'non reciprocal' [*'non réciproque'*].



rationality, is hardly cause for threnody. No matter how insistently the bureaucratic ethos of technical/universal homogeneity promotes its centralising and uniformising ambitions through the accumulation of 'McNuggets' of legal information, the reformulation of the 'legal' simply cannot condone a disempowering of local epistemologies in a context where a salient feature of the specificity of legal discourse lies precisely in its *embeddedness*.

The favour that 'sameness' research continues to enjoy points to the good measure of distance comparative legal studies must still travel before it liberates itself from monological discourse and at long last acquires the intellectual credibility that it has thus far properly been denied on account of its recurrent failure to propound deep explanation. Comparative legal studies is not something that needs to be preserved. It is something that requires to be *achieved*, something *yet to come*. The goal must be *transformation* rather than reform.

As the discipline fundamentally reconstructs itself and overcomes its disciplinary (and disciplinarian) strictures, as comparison finally advances beyond its entrenched ahistoricism and finally reveals a cultural consciousness, and as *comparatists* (not academics trained in the local law with nothing more than a smattering of a foreign language and an inclination towards fashionable cosmopolitanism) undertake to show greater sensitivity to the characteristic features of laws and experiences of law that are not theirs, to eschew cultural appropriation and cultural erasure in the name of *justice* (the justice that is due to the other's law and to the other-in-the-law),<sup>24</sup> a comparative legal studies *yet to come* can be expected to address — responsively and responsibly — the idiomatic limits within which any 'convergence' agenda must operate and the constraints that, ultimately, must defeat it.<sup>25</sup>

As comparatists-at-law cultivate difference, as they work their way through misunderstandings, as they make mistakes, they realise that the precarious points of contact resulting from mismatches between laws, languages, and cultures are *enabling* in that they offer the key to pluralistic thought and the stimulus for aesthetics and philosophy.

<sup>24</sup> For a challenging exploration of the irreducible connections between 'justice' and 'singularity', see Derrida, J (1994) *Force de loi* Galilée at 11-63.

<sup>25</sup> Derrida notes that 'responsibility demands irreplaceable singularity': Derrida, J *Donner la mort* supra note 2 at 77 [*La responsabilité exige la singularité irremplaçable*]. Cf Spivak, GC (2003) *Death of a Discipline* Columbia University Press, where the author's geopolitical critique charts an audacious, exigent, and urgent future for the field of comparative literature (making express reference to the need to engage with the specificity of writing in subaltern sites). The programme that I advocate for grounding a differentiated enculturation of comparative legal studies also suggests a close parallel with the field of psychology. Culture once mattered for psychologists. The turn of the century, however, largely under the influence of German scholarship, marked the advent of psychology-as-science, that is, the emergence of an experimental and quantitative approach to behaviourism stressing the values of replicability, verifiability, and predictability. Psychologists then began to assign a secondary, if not superficial, role to culture in the constitution of mental life. For psychologists who understand that the mind cannot be divorced from the historically and culturally diverse worlds within which it intervenes (and which it shapes), the challenge is now to promote a culturally-informed theory of mind or a developmental psychology in which culture is accorded a constitutive role. For an overview, see Cole, M (1996) *Cultural Psychology: A Once and Future Discipline* Harvard University Press. See also, eg, Shore, B (1996) *Culture in Mind: Cognition, Culture, and the Problem of Meaning* Oxford University Press; Shweder, RA (1991) *Thinking Through Cultures: Expeditions in Cultural Psychology* Harvard University Press; Wertsch, JV (1991) *Voices of the Mind* Harvard University Press; id, del Río, P and Alvarez, A (ed) (1995) *Sociocultural Studies of Mind* Cambridge University Press; D'Andrade, R (1995) *The Development of Cognitive Anthropology* Cambridge University Press; Bruner, J (1990) *Acts of Meaning* Harvard University Press; id (1996) *The Culture of Education* Harvard University Press at 160-85. Bruner's scholarship is helpfully reviewed in Geertz, C 'Learning with Bruner' (10 April 1997) *The New York Review of Books* at 22-24.

After all, Roland Barthes tells us that ‘the subject reaches bliss through the cohabitation of languages *that work side by side*’.<sup>26</sup>

Law is haunted. What is visibly, literally, exegetically, present, say, in a law-text, is never all of the presence there is. For there is also that which is present — at least just as present, possibly more so — yet that is but a ghostly presence.<sup>27</sup> Thus is ‘law [...] thoroughly a cultural construct’<sup>28</sup> — although the fact may be most inconvenient to acknowledge for lawyers who, within the narrow limits of their technical expertise, ‘have invested hard, painful labor into the mastery of dry, obscure, and maddeningly intricate grids’.<sup>29</sup> Within the structural constraints set by the human interpretive apparatus (the comparatist must learn to live within his cognitive means), understanding of a law or of an experience of law other than one’s own can only arise (to the extent that it *can* arise) from thorough cultural embeddedness. Let comparatists-at-law concern themselves with *ghosts*.

The move beyond the narrowness and exclusivism of positivism and logocentrism makes possible an active and activist comparative practice allowing comparatists-at-law to create ever more critical pictures of what laws are and of what they have failed to become, opening the possibility for them to say something unscripted, unexpected — *different*. It is ultimately in the way in which it inculcates antipositivism and antilogocentrism that comparative legal studies is (potentially) progressive and meliorative.

I argue for a protocol of action foregrounding an interpellative and interlocutory ethics upon which all other structures organising the relation between self and other — and between self-in-the-law and other-in-the-law — must rest. The politics of understanding I defend requires comparatists to become addressees of validity-claims made and accepted by the other on the basis of ontological-symbolic premises guiding his statements and action and taken by him as being correct. I defend the hermeneutical exigencies of a non-totalising thought, a thought that accepts the other as interlocutor, that finds its closest grammatical analogue in the vocative, that allows the other (and the other-in-the-law) to signify according to himself and to his own *obviousness*, that accepts that the other is not just a modality of the self, that is, ultimately and empathically, *for* the other.<sup>30</sup>

Comparative interventions must not only feature research about otherness-in-the-law, but also include *mesearch* about selfhood-in-the-law. Alterity provides a perspective from which ‘the limitations, incoherences, and poverty of resources of [one’s] own beliefs can be identified, characterized, and explained in a way not possible from within [one’s] own tradition’.<sup>31</sup> As comparative legal studies wishes to acknowledge difference, it wants to open the possibility for the comparatist to be altered in his encounter with difference.

(Note that as it recognises law-as-culture, comparative legal studies is making law become *what it always-already is*, rather than turning it into something that it has not been

<sup>26</sup> Barthes, R (1973) *Le plaisir du texte* Le Seuil at 10 [‘le sujet accède à la jouissance par la cohabitation des langages, qui travaillent côte à côte’] (emphasis original). For an insightful account connecting bilingualism with aesthetic pleasure and political advantage, see Sommer, D (2004) *Bilingual Aesthetics* Duke University Press.

<sup>27</sup> ‘Spectrality’ is a key Derridean motif. For one thing, a text, any text, is always-already inscribed within a consecution. Derrida refers to ‘a quasi-logic of the ghost that one ought to substitute, because it is stronger, to an ontological logic of the presence’: Derrida, J *Force de loi* supra note 24 at 68 [‘une quasi-logique du fantôme qu’il faudrait substituer, parce qu’elle est plus forte qu’elle, à une logique ontologique de la présence’].

<sup>28</sup> Tamanaha, BZ (1997) *Realistic Socio-Legal Theory* Oxford University Press at 128.

<sup>29</sup> Schlag, P (1998) *The Enchantment of Reason* Duke University Press at 11.

<sup>30</sup> For a thoughtful reflection on being ‘for the other’, see Bauman, Z *Postmodern Ethics* supra note 18 at 90.

<sup>31</sup> MacIntyre, A (1988) *Whose Justice? Which Rationality?* University of Notre Dame Press at 387-88.

or that it is not. In other words, it is not that there is an 'unenculturated' law that can finally become 'enculturated' if only comparatists will allow it to realise its potential and purpose. It is rather that law has always been 'enculturated', but that comparatists have been unwilling to raise the cultural dimension to expression. It is in that sense that 'culture' can be envisaged as the 'dangerous supplement' that comparatists-at-law have not wanted to see.<sup>32)</sup>

## II CULTURE, THEN

The informing context 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.

George Steiner<sup>33</sup>

The world is absolutely, completely legal[.]

Thomas Bernhard<sup>34</sup>

*There is 'culture', of which one could say what has been said of philosophy: that it allows us 'to understand how things in the broadest possible sense of the term hang together in the broadest possible sense of the term'.<sup>35</sup> More specifically, I apprehend 'culture' as referring to frameworks of intangibles within which ascertainable interpretive communities operate and which have normative force for these communities, even though not coherently and completely instantiated. And there is 'law-as-culture', which I take to mean the framework of intangibles within which an ascertainable 'legal' community (understood here in the more specialised or technical sense) operates and which organises (not always seamlessly) the identity of such legal community as legal community. Bearing in mind that definitions are inevitably unsatisfactory (and that cavils about definitions are inherently endless and fruitless),<sup>36</sup> what is 'culture' and why must it matter to lawyers? How does culture work?<sup>37</sup>*

<sup>32</sup> Derrida, J (1967) *De la grammatologie* Editions de Minuit at 203 ['*dangereux supplément*'].

<sup>33</sup> Steiner, G (1997) *Errata* Weidenfeld and Nicolson at 19.

<sup>34</sup> Bernhard, T (2001) [1967] 'Ist es eine Komödie? Ist es eine Tragödie?' in *Erzählungen* Suhrkamp at 74 ['*Die Welt ist eine ganz und gar, durch und durch juristische*'].

<sup>35</sup> Sellars, W (1963) *Science, Perception and Reality* Routledge and Kegan Paul at 1.

<sup>36</sup> Definitions, in fact, abound, one of the ur-texts of contemporary anthropology thus referring to the 'webs of significance [in which man is suspended and which he himself has spun]': Geertz, C (1993) [1973] *The Interpretation of Cultures* Fontana at 5.

<sup>37</sup> Useful surveys of theoretical work on 'culture' include Smith, P (2001) *Cultural Theory* Blackwell; Harris, M (1999) *Theories of Culture in Postmodern Times* Sage; Münch, R and Smelser, NJ (eds) (1992) *Theory of Culture* University of California Press. For helpful introductions to the idea of 'culture', see Wagner, R (1981) *The Invention of Culture* University of Chicago Press; Bauman, Z (1999) *Culture as Praxis* (2nd ed) Sage; Mulhern, F (2000) *Culture/Metaculture* Routledge; Jenks, C (1993) *Culture* Routledge; Inglis, F (2004) *Culture* Polity; Schneider, MA (1993) *Culture and Enchantment* University of Chicago Press.

One of the most pervasive beliefs encountered in the humanities is the conviction that, in some meaningful way, the individual owes his existence to society, in other words, that personalities, needs, and wants are nurtured and sustained by the community in which human beings dwell. But the idea of the social nature of the individual is as elusive as it is ubiquitous, because it seems at once to be saying something so incontrovertible as to be devoid of methodological significance *and* to be advancing a thesis so radical as to be threatening the very possibility of human individuality and self-determination.

As he engages in social forms of activity, the individual ascribes significance and value to his environment. Objects, for instance, are endowed with social meaning beyond their materiality or strictly physical nature. This ascription of significance is a function of the purposes for which the object was created and of the uses to which it is put. When 'that thing' is called a 'pen', it acquires an additional form of existence at the level of meaning which was never part of its physical nature as such. It is through this ascriptive process that the world becomes an object of significance beyond its raw materiality and that it can therefore become an object of thought. This is to say that thought can only emerge in an environment of socially-constituted meanings, or that thought is only possible for an individual once he has been socialised into the practices of a community (for example, within the family or at school). It is the appropriation or internalisation of these practices which, literally, 'creates' the individual mind. Since the practices themselves inscribe various collective allegiances such as national, geographical, ethnic, religious, and linguistic affiliation, the individual mind can reasonably be said to be formed as it is inaugurated into the thought processes or beliefs of collectivities.<sup>38</sup> Rather than stand in opposition to society, the individual is thus 'one of its forms of existence'.<sup>39</sup> It is in this way that Karl Mannheim observes how the thinking that arises within a community is not the product of individuals, but rather that of a group having developed a particular 'style of thought' on account of continual responses to a range of situations which members of the group confront given the specific position in which the group finds itself.<sup>40</sup> Thought is, therefore, culturally constituted in a very significant way (which, it must be said at the outset, is emphatically not to suggest that the individual mind is somehow the 'mirror' of society). Otherwise, responses to events would be *ad hoc* springing not from a sense of meaning, but only from ideas called into being by the immediate circumstances or the current mental state of the individual.

Culture, of course, goes beyond the formalised practices operating in a group. Although it embraces conscious and formal beliefs, the constitution of identity is also accomplished through 'less conscious, less formulated attitudes, habits and feelings, or even unconscious assumptions, bearings and commitments'.<sup>41</sup> Protean perceptions, inchoate awareness, or unconscious assumptions are, in fact, particularly significant elements of the relevant cultural 'data' (but what is ever *given?*), as has been underlined by anthropologists who

<sup>38</sup> I follow Bakhurst, D (1997) 'Activity, Consciousness, and Communication' in Cole, M, Engeström, Y and Vasquez, O (eds) *Mind, Culture, and Activity* Cambridge University Press at 147-63. See also Shweder, RA (2003) *Why Do Men Barbecue?* Harvard University Press at 136: 'culture thus consists of meanings, conceptions, and interpretive schemes that are activated, constructed, or brought alive through *participation* in normative social institutions and routine practices (including linguistic practices)' [my emphasis]. *Addre*: Strauss, C and Quinn, N (1997) *A Cognitive Theory of Cultural Meaning* Cambridge University Press.

<sup>39</sup> Bourdieu, P (1984) *Questions de sociologie* Editions de Minuit at 29 ['une de ses formes d'existence'].

<sup>40</sup> Mannheim, K (1936) [1929] *Ideology and Utopia* Wirth, L and Shils, E (trans) Harcourt Brace Jovanovich at 3.

<sup>41</sup> Williams, R (1981) *Culture* Fontana at 26.

note that 'what informants find difficult to verbalize is more important, more fundamental, in the cultural organization of ideas than what they can verbalize'.<sup>42</sup> In sum, allowing for the complexity and ambiguity of individual perceptions of external realities, a *mentalité* — which suggests an array of predispositions, predilections, propensities, or inclinations — is the outcome of a process of transformation of often unconscious aspirations or expectations according to the concrete indices of what is probable, possible, or impossible for an identifiable community into relatively durable tendencies that are internalised intergenerationally through socialisation and that crystallise into patterns of action.

For comparative legal studies to apprehend law as culture thus attests to a commitment to a unit of analysis which includes individuals and their social milieu and which no longer regards the technical dimension of the posited law as a controlling centre of the action.<sup>43</sup> Culture is made to function as an omnibus category which allows the comparatist to point to the posited law not only in terms of its materiality (the rules, the precepts, and so forth), but, more importantly, at the level of its meaning which alone can reveal why the posited law was created in the way it was (and not otherwise) and which alone can disclose the goals sought by a community as it invests itself into its posited law. No formulation of the posited law can safely escape a cultural interpretation and all formulations of the posited law can therefore be helpfully envisaged as cultural expressions.

In significant ways, the posited law can also be apprehended as a manifestation of 'legal tradition', understood here to mean something like *culture-in-time*, that is, to refer to epistemological clusters that have fashioned themselves over the long term, or very long term, and that have shaped cognitive, intuitive, and emotional approaches to law at the level of local legal cultures, for example, 'a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about

<sup>42</sup> LeVine, RA (1984) 'Properties of Culture: An Ethnographic View' in Shweder, RA and LeVine, RA (eds) *Culture Theory* Cambridge University Press at 76. Cf Spiro, ME (1987) [1982] 'Collective Representations and Mental Representations in Religious Symbol Systems' in Kilborne, B and Langness, LL (eds) *Culture and Human Nature: Theoretical Papers of Melford E. Spiro* University of Chicago Press at 161-62: 'to attempt to understand culture by ignoring the human mind is like attempting to understand *Hamlet* by ignoring the Prince of Denmark'.

<sup>43</sup> The contours of the 'unit' will vary according to the nature of the comparative intervention. In other words, what constitutes a culture depends on the specific matter that the comparatist-at-law is addressing. For example, the legal culture at issue might be that of the commercial courts in France, of labour lawyers in Poitiers, or of Corsica. It could also be — and, indeed, will often be — coterminous with the French legal community as a whole, that is, with the group of legal agents who have French citizenship in common (ie, who are 'French') — although even a notion like 'citizenship' can hardly claim impermeable intellectual borders. There is more. Any individual partakes in a seemingly infinite array of ascertainable cultural formations. One can be a labour lawyer in Poitiers while being a woman, a Belgian expatriate, a European, a militant of Amnesty International, a breeder of siamese cats regularly entering international competitions, and a long-standing member of the *Parti socialiste*. The decision by the comparatist to address one specific manifestation of culture cannot be taken to deny the legitimacy of cultural analysis. Any research endeavour must contend with the matter of boundedness. Nor can the decision to map one particular feature of the discursive sprawl that is culture be taken to suggest a lack of awareness of the composite character of cultural identity. If authority be needed to lend credence to my argument, I can offer a powerful statement by someone who can hardly stand accused of not having thought about thought: 'All knowledge originates from separation, delimitation, and restriction; there is no absolute knowledge of a whole'. The quotation is from Friedrich Nietzsche (1979) [1872] 'The Philosopher: Reflections on the Struggle Between Art and Knowledge' in Breazeale, D (ed and trans) *Philosophy and Truth* Humanities Press International at 39. For the original text, see id (1922) 'Der letzte Philosoph. Der Philosoph. Betrachtungen über den Kampf von Kunst und Erkenntnis' in *Friedrich Nietzsche Gesammelte Werke [Musarionausgabe]* vol VI Musarion at 43 ['*Alles Wissen entsteht durch Separation, Abgrenzung, Beschränkung; kein absolutes Wissen eines Ganzen!*'].

the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught'.<sup>44</sup> I do not intend tradition in the static, linear, totalising, permanent, and idealised sense, which detrationalists justifiably condemn.<sup>45</sup> Nor am I subscribing to the doctrine of infant determinism that would have tradition reduced to a dogmatic force which eliminates the power of agency (let me emphasise that I take the view that individual reflection is not confined to the facticity of tradition and that prejudices, for instance, can be thematised through thought and their strength attenuated). Nor am I suggesting that traditions are to be envisaged as windowless monads allowing neither for cross-cultural interaction nor for cultural overlap. Rather, I have in mind something like structures of attitude and reference having normative (or structuring) force for legal communities (even though often operating beneath consciousness), both by empowering legal agents and by limiting their possibilities of experience in ways that attest to the fact that positionality or situatedness is never fully individual — a phenomenon which could be referred to as 'structure-in-agency'.<sup>46</sup> While not denying that culture is also the product of the activities of subjects who constantly reformulate experience within a symbolic order, the comparatist-at-law's assumption must be that 'there are historical structures operating over the long term [or very long term] which are the foundation of the collective identity of men and women who have lived together for a long time across generations'.<sup>47</sup> Fernand Braudel thus observes that a *mentalité*, 'which dictates attitudes, orients choices, roots prejudices', is 'the fruit of distant legacies, of beliefs, of fears, of ancient anxieties'.<sup>48</sup> In brief, the notion of 'legal tradition' is meant to embrace the idea of 'tacit knowledge' as it circumscribes *over time* a horizon of meanings and possibilities with respect to the theoretical and practical information that can be acquired and used within a legal culture. It refers to an idiosyncratic cosmology of patterns, 'always-already-in-being', within which one finds oneself 'always-already' ensconsed (think of the way one is projected into language). This socially-generated and shared context of meaning, which renders action intelligible to those involved and delineates the boundaries of relevance and irrelevance within a legal culture, accounts for cognitive, intuitive, and emotional approaches to law, legal knowledge, the place

<sup>44</sup> Merryman, JH (1985) *The Civil Law Tradition* (2nd ed) Stanford University Press at 2. Two qualifications are in order. First, traditions can be of recent coinage. See, eg, Hobsbawn, E and Ranger, T (ed) (1983) *The Invention of Tradition* Cambridge University Press. Secondly, traditions feature anomalous or transitory phenomena, let us say, *incongruities*.

<sup>45</sup> See, eg, Heelas, P, Lash, S and Morris, P (eds) (1996) *Detraditionalization* Blackwell.

<sup>46</sup> The notion of 'tradition', to be captured in terms of 'antecedents' rather than 'causes', is most famously developed in Gadamer, H-G (1989) [1960] *Truth and Method* (2nd rev ed) Weinsheimer, J and Marshall, DG (trans) Sheed and Ward passim; and, through the idea of 'tradition of inquiry', in MacIntyre, A (1984) *After Virtue* (2nd ed) University of Notre Dame Press at 126-27, 130, and 204-25; id *Whose Justice? Which Rationality?* supra note 31, esp at 349-403; id (1990) *Three Rival Versions of Moral Enquiry* University of Notre Dame Press esp at 105-26 and 196-215. At this stage, my basic point is that 'one cannot be a self on one's own': Taylor, C (1989) *Sources of the Self* Harvard University Press at 36 — although I agree that '[t]he relational dimension of selfhood cannot be the sole source of the reflective one': Siegel, J (2005) *The Idea of the Self* Cambridge University Press at 25. The notion of 'structures of attitude and reference' to which I refer is a central motif in Said, EW (1993) *Culture and Imperialism* Knopf.

<sup>47</sup> Le Goff, J (1994) *La vieille Europe et la nôtre* Le Seuil at 67 ['il y a dans l'histoire des structures de longue durée qui sont le fondement de l'identité collective des hommes et des femmes qui ont vécu longtemps ensemble à travers les générations']. I have added the bracketed words in my English version of the quotation.

<sup>48</sup> Braudel, F (1993) [1963] *Grammaire des civilisations* Flammarion at 53 ['dicte les attitudes, oriente les choix, enrachine les préjugés' / 'le fruit d'héritages lointains, de croyances, de peurs, d'inquiétudes anciennes'].

assumed by legislation in society, the function of the judge, and so forth.<sup>49</sup> Put differently, my claim is that all law may be seen 'not as a response to the immediate circumstances or current mental state of an interlocutor or of oneself, but as part of an unfolding story'.<sup>50</sup> The comparatist-at-law's task thus becomes 'a venture into cultural hermeneutics'.<sup>51</sup>

<sup>49</sup> The idea of 'tradition', which takes us beyond national boundaries and the problematic language of 'legal system' and, even more importantly, shows at a meta-stable level how the connection of my present perception with past experience is part of a continuing life-history *along* with it (rather than being causally affected by it and therefore separated from it) and *against* the present, enclosed as it is in its own self-certainty. Tradition, then, is also emancipation from the present. In other words, what comes to one from the past can be a means of drawing one out of oneself, of constituting oneself as historical being — which, as far as law's subjects are concerned, entails the opportunity of escaping from a positivistic strategy of world-making predicated on the exclusion of the uncontainable. To reduce 'tradition' to a massive typological narrative or a vast programme of structural integration, to stress perpetuation over dissemination, as is commonly done, is, therefore, to miss the hermeneutical point. In an important essay offering a sensitive treatment of the idea of 'tradition' allowing for agency and reflexivity, of 'tradition' as a source of *enabling* knowledge, Gerald Bruns observes how 'tradition is not the persistence of the same'. Rather, 'it is the disruption of the same by that which cannot be repressed or subsumed into a familiar category'. He adds: 'The encounter with tradition [...] is always subversive of totalization or containment': Bruns, GL (1992) *Hermeneutics Ancient and Modern* Yale University Press at 201-02. For compelling treatments of law as tradition, see Krygier, M (1986) 'Law as Tradition' (5) *Law and Philosophy* 237; id (1988) 'The Traditionality of Statutes' (1) *Ratio Juris* 20.

<sup>50</sup> Carrithers, M (1992) *Why Humans Have Cultures* Oxford University Press at 82.

<sup>51</sup> Glendon, MA (1987) *Abortion and Divorce in Western Law* Harvard University Press at 8. Observe that the presence of legal phenomena operating on the global level in relative insulation from the state does not mean a fundamental detraditionalisation of law. Although global legal processes may indicate a weakening of the state as a source of identity, that is, a measure of deterritorialisation, it is hard to see how a transnational corporation or the IMF, for instance, can offer a competing source of 'cultural resonance' to the national bond and its history and mythology. And even as the specialised and technical corporate legal discourse appears as the expression of an idiosyncratic, transnational culture (see, on point, Westbrook, D (2004) *City of Gold* Routledge), it remains the case that the global can be traced to local ties (I suggest that this is so even as regards McDonald's or Coca-Cola, no matter how standardised such transcultural icons may at first blush appear!). Culture and uniformity are words that simply do not belong together. If one wants to talk about, say, a globalised corporate culture, one must exclude the notion of 'uniformity'. Thus, the idea of a law that has allegedly escaped from all cultural grammar, an *acultural* law, whether global or regional, cannot be envisaged. Even transcultural legal phenomena are not above culture, if only because they arise from a cultural diversity that is already there; they are the outcome of cultural flow. Think of transnational corporations, which are invariably rooted in local (often US) culture. My point is that a legal meta-culture must not be taken to suggest a *tabula rasa*. Any purported *consensus gentium* — say, the distinctive cluster of meanings, symbols, and practices associated with transnational finance or international arbitration — finds its anchorage in the variations in meaning systems that individuals from different legal communities gather to assemble such that the finished product continues to reveal a dependence upon a certain kind of learning which sets limits to cultural variability. In other words, I argue that even the legal globalisers are, to an extent at least, constructed out of their own legal culture's materials of meaning and expression and, to that extent at least, remain possessed by their legal culture. Also, there is an irreducible element of autochthony constraining the epistemological receptivity to globalisation and fostering instead various forms of 'glocalization'. The word is in Robertson, R (1995) 'Glocalization: Time-Space and Homogeneity-Heterogeneity' in Featherstone, M Lash, S and Robertson, R (eds) *Global Modernities* Sage at 25-44. In the face of transnational administration and investment, local difference persists. (Indeed, at times, one has the distinct feeling that local difference finds itself exacerbated on account of globalisation as when culture is apprehended as a valuable resource to be used for various contestatory socioeconomic and political ends.) 'The point is that people in each place make their own uses even of the most global commodities', such that 'homogeneity [...] is still the local kind': Appiah, KA (2006) *Cosmopolitanism* Norton at 113 and 102, respectively. Alternatively, one can claim that '[t]here exists no place that can be said to be "non-local"': Latour, B (2005) *Reassembling the Social* Oxford University Press at 179. Unsurprisingly, therefore, it is shown that even as the legal notion of 'good faith' is being 'globalised', cultural embeddedness continues to be strong such that the German model cannot be transferred to the United Kingdom because it is linked to a specific production regime. See Teubner, G (1998) 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (61) *Modern Law Review* 11. In other words, 'culture [...] dissolve[s] globalization [...] into a wide variety of different mutations, as each manifestation of multinational economics reaches into and is absorbed by the customs, cognitions, committees, and significances which together make up the locations of culture': Inglis,

(Tradition and culture do not contradict one another. The question whether tradition is to be envisaged as a sub-set of culture or as comprehending culture seems in the final analysis to depend on the extent to which one wishes to stress the sovereignty of history over present experience — a decision turning on any comparatist-at-law's desire to insist or not on the burden of inherited institutional significance [consider how enormously powerful traditional claims made by or on behalf of Native Americans can prove to be]. Perhaps the most helpful way to approach the dialectic between the cultural and the traditional is to think of culture as being the contemporary instantiation of tradition and of tradition as being the historical valency of culture. There remains the matter of the choice between the two predilections. My preference appears from the text.)

Building on this reflection, I want to suggest some further thoughts pertaining to the study of law as a culturally-embedded discourse. 'Culture' is said to be 'one of the two or three most complicated words in the English language'.<sup>52</sup> A key feature accounting for culture's elusive contours — its implicit or tacit character — can, it seems to me, usefully be seized by way of a metaphor and an anecdote. The figure of speech is Edward Hall's who, acknowledging the difficulty of offering a rigorous definition and insisting upon the fact that 'no constant elemental units of culture have as yet been satisfactorily established', refers to culture as 'the silent language'.<sup>53</sup> The following narrative captures the point. It is taken from an essay published in Russian in 1926, the title of which was translated into English as 'Discourse in Life and Discourse in Poetry':

Two people are sitting in a room. They are both silent. Then one of them says, 'Well!'. The other does not respond.

For us, as outsiders, this entire 'conversation' is utterly incomprehensible. Taken in isolation, the utterance 'Well!' is empty and unintelligible. Nevertheless, this

---

F *Culture* supra note 37 at 144. For studies insisting on the centrality of culture to globalisation and showing how cultural agency is negotiated within globalised contexts, see, eg, Tomlinson, J (1999) *Globalization and Culture* Polity; Pieterse, JN (2004) *Globalization and Culture* Rowman and Littlefield; Berger, PL and Huntington, SP (eds) *Many Globalizations* Oxford University Press; Jameson, F and Miyoshi, M (eds) (1998) *The Cultures of Globalization* Duke University Press; Lowe, L and Lloyd, D (eds) (1997) *The Politics of Culture in the Shadow of Capital* Duke University Press; Ong, A and Collier, SJ (eds) (2005) *Global Assemblages* Blackwell; King, AD (ed) (1991) *Culture, Globalization and the World-System* Macmillan; Appadurai, A (1996) *Modernity at Large* University of Minnesota Press; Friedman, J (1994) *Cultural Identity and Global Process* Sage; Hannerz, U (1996) *Transnational Connections* Routledge; Yúdice, G (2003) *The Expediency of Culture* Duke University Press; D'Iribarne, P et al (1998) *Cultures et mondialisation* Le Seuil; Kraidy, M (2005) *Hybridity, or the Cultural Logic of Globalization* Temple University Press; Appiah, KA *Cosmopolitanism* supra; Niezen, R (2004) *A World Beyond Difference* Blackwell. Cf Dezalay, Y and Garth, BG (1996) *Dealing in Virtue* University of Chicago Press at 317, who, writing with specific reference to the field of transnational commercial dispute resolution and addressing the matter of its influence on national laws, observe that 'the impact of internationalization is not automatic or determined in advance'. Indeed, even an unabashed partisan of economic globalisation feels the need to address the matter of 'culture' and, specifically, the question of cultural homogenisation, by stressing adaptations to local cultures. See Bhagwati, J (2004) *In Defense of Globalization* Oxford University Press at 106-21. In sum, '[w]hatever globalization may turn out to be [...], it is refracted, rebutted, repelled and reconstituted by cultures': Inglis, F *Culture* supra note 37 at 74.

<sup>52</sup> Williams, R (1983) *Keywords* (2nd ed) Fontana at 87. Cf Herder, JG (1985) *Ideen zur Philosophie der Geschichte der Menschheit* Fourier at 39: 'Nothing is more indefinite than this word' ['*Nichts ist unbestimmter als dieses Wort (Kultur)*'] (1784). For a critical exploration of the meaning of 'culture' (including a useful array of references), see Hartman, GH (1997) *The Fateful Question of Culture* Columbia University Press at 21-59 and 205-24. According to Hartman, Herder is the first to use the word 'culture' to mean 'identity culture', that is, to employ it 'in the modern sense': id at 211 [emphasis original].

<sup>53</sup> Hall, ET (1959) *The Silent Language* Doubleday at 20 and 25, respectively.



peculiar colloquy of two persons, consisting of only one — although, to be sure, one expressively intoned — word [the word in Russian is *tak*], does make perfect sense, is fully meaningful and complete.

In order to disclose the sense and meaning of this colloquy, we must analyze it. But what is it exactly that we can subject to analysis? Whatever pains we take with the purely verbal part of the utterance, however subtly we define the phonetic, morphological, and semantic factors of the word *well*, we shall still not come a single step closer to an understanding of the whole sense of the colloquy.

Let us suppose that the intonation with which this word was pronounced is known to us: indignation and reproach moderated by a certain amount of humor. This intonation somewhat fills in the semantic void of the adverb *well*, but still does not reveal the meaning of the whole.

What is it we lack, then? We lack the ‘extraverbal context’ that made the word *well* a meaningful locution for the listener. This *extraverbal context* of the utterance is comprised of three factors: (1) the *common spatial purview* of the interlocutors (the unity of the visible — in this case, the room, a window, and so on), (2) the *interlocutors’ common knowledge and understanding of the situation*, and (3) their *common evaluation* of that situation.

At the time the colloquy took place, both interlocutors *looked up* at the window and *saw* that it had begun to snow; *both knew* that it was already May and that it was high time for spring to come; finally, *both were sick and tired* of the protracted winter — *they were both looking forward* to spring and *both were bitterly disappointed* by the late snowfall. On this ‘jointly seen’ (snowflakes outside the window), ‘jointly known’ (the time of the year — May), and ‘unanimously evaluated’ (winter wearied of, spring looked forward to) — on all this the utterance *directly depends*, all this is seized in its actual, living import — is its very sustenance. And yet all this remains without verbal specification or articulation. The snowflakes remain outside the window; the date, on the page of a calendar; the evaluation, in the psyche of the speaker; and nevertheless, all this is assumed in the word *well*.<sup>54</sup>

The elaborate reference to spatio-temporal embeddedness ascribing meaning to one word contributes to the intelligibilisation of culture as occupying a middle-ground between what is shared by all or most human beings — such commonalities might include an appreciation of the difference between ‘to hit’ and ‘to be hit’<sup>55</sup> — and what is unique to each individual. As a term attempting to delineate identity, culture refers to features that are not universal, but that transcend the individual; it marks what Marc Augé calls a ‘collective singularity’.<sup>56</sup> Culture helps us to realise that the individuals we encounter are (at some level, at least) part of a community. It thus forces us to escape the dichotomy whereby we see ways either as universal — especially when we focus on our own — or as idiosyncratic — when we meet someone with a different world-view from our own.

<sup>54</sup> Holquist, M (1990) *Dialogism* Routledge at 62-63 [emphasis original]. Although the paper is signed by Valentin Voloshinov, its authorship became contentious once Mikhail Bakhtin claimed that he had published some of his work under the names of friends, including Voloshinov; see id at 8 and 193-94.

<sup>55</sup> Bruner, J *The Culture of Education* supra note 25 at 36.

<sup>56</sup> Augé, M (1994) *Le sens des autres* Fayard at 90 [*singularité collective*].

The notion of 'culture', indeed, captures the idea of shared mental programmes that have formed, not on account of the fact that we live on this planet, nor because of our uniqueness, but as a function of the community to which we belong. Thus, '[w]hat one means by legal culture [...] is best illustrated by reference to [such commonalities as] legal language, legal reasoning, legal argument and legal justification' — all aspects of a culture's 'ostensivity', that is, of the signs of human action through which culture manifests itself.<sup>57</sup> Culture takes us beyond mere words and leads us into an unstated and assumed realm which itself operates in juxtaposition to words, qualifies them, and makes them meaningful.<sup>58</sup> Often, that entire realm finds itself located not only beyond words, but beyond awareness, that is, beyond the awareness of the observed and possibly beyond that of the observer (who still tends to act as if the word or, in law, the rule or precept was the whole).

Culture is, therefore, a different type of eloquence; it consists of an alternative, wider-ranging message system. It is concerned with 'collective consciousness', or what is imprecisely termed the 'history of collective ideas'. It purports to ascertain, for instance, the factors underlying the constitution of specific legal climates and the shaping of collective re-presentations within a given community. To argue that discrete patterns of reasoning or of discourse or of implicit beliefs can be inferred from the respective modes of behaviour followed by various legal communities is to accept that these characteristics, in order to qualify, need not only be distinctive but also recurrent and pervasive; they must, in other words, inform a substantial part of the ideas, beliefs, and assumptions of the legal group concerned. These remarks raise the difficult questions of uniformity and constraint.<sup>59</sup>

First, culture is not uniform. Obviously, collectivities do not think, and the anthropomorphisation of a legal culture runs the risk of having individuals pictured as being somehow disembodied and entirely dependent upon a community. It also raises the equally serious trap of minimising intra-cultural dissonances, inconsistencies, and contradictions.<sup>60</sup> The point is not to claim that a *mentalité* is monolithic so that every individual within a community would act within precisely the same cognitive framework in response to typical objects and events (nor is it, incidentally, to propound that individual world-views are internally consistent). There is no question of 'disciplining' adherents to a legal culture, say, into a single and authentic identity. Such stereotypical inflexion suggesting the dominion of some principle of non-contradiction should be avoided for the shared meanings, attitudes, and values that form a *mentalité* are simply not experienced

<sup>57</sup> Wilson, G (1987) 'English Legal Scholarship' (50) *Modern Law Review* 818 at 845. The notion of 'ostensivity' is in Inglis, F *Culture* supra note 37 at 29. Cf Barkow, J (1989) *Darwin, Sex, and Status: Biological Approaches to Mind and Culture* University of Toronto Press at 142: 'To describe behaviour as "cultural" tells us only that the action and its meaning are shared and not a matter of individual idiosyncrasy'.

<sup>58</sup> Hall, ET *The Silent Language* supra note 53 at xi.

<sup>59</sup> I have raised the matter of uniformity above, at note 51. As I elaborate upon these questions, I am mindful of the reactions to my work, eg in Joerges, C (1997) 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (3) *European Law Journal* 378; Schäfer, B and Bankowski, Z (2000) 'Mistaken Identities: The Integrative Force of Private Law' in Van Hoëcke, M and Ost, F (eds) *The Harmonisation of European Private Law* Hart 21; Nelken, D (2003) 'Comparatists and Transferability' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 437; Cotterrell, R (2003) 'Comparatists and Sociology' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 131; Whitman, JQ (2003) 'The Neo-Romantic Turn' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 312.

<sup>60</sup> See Lloyd, GER (1990) *Demystifying Mentalities* Cambridge University Press at 5.

by everyone; no two individuals cook pasta or play the violin (or think about the doctrine of precedent) in the same way. To suggest otherwise would be dangerous. It is essential to account for a measure of heterology within a culture at any particular time, since every culture is tested and contested by individuals who inhabit it and whom it inhabits, as a function of the way in which power manifests itself.<sup>61</sup> Thus, a culture has to accommodate internal tensions and instabilities (which it will ignore, suppress as deviance, or strive to re-locate within the mainstream): 'the experience of cultural difference is *internal* to a culture'.<sup>62</sup> In the words of Edward Said, 'all cultures are involved in one another; none is single and pure, all are hybrid, heterogeneous, extraordinarily differentiated, and unmonolithic'.<sup>63</sup> The comparatist-at-law must ensure that reference to the notions of 'culture' or 'tradition' does not, despite '[their] cosy invocation of consensus', 'serve to distract attention from social [...] contradictions, from the fractures and oppositions within the whole'.<sup>64</sup> Meanings are not reducible to common meanings. For instance, one can easily imagine divisions as to the merits of judicial activism taking place within a legal community. Arguably, then, there would be a lack of 'common meaning' as regards the limits of judicial activism. Yet, this failure of consensus occurs within the ambit of the practice of adjudication as it is experienced in that legal community. This 'common reference world' constitutes the web of intersubjective meaning 'which [is] constitutive of the social matrix in which individuals find themselves and act' or 'the background to social action'.<sup>65</sup> As comparative legal studies seeks to account for the intersubjectivity that captures the irreducibility of human interaction, it must continue to allow, therefore, for dissensus within a community.

Culture, being an integral part of the game of social control, social conflict, and social change, attests to relations of power which manifest themselves, for instance, through the distribution of knowledge amongst members of the group. Not all actors are equally situated to understand and act upon the world in similar terms. In fact, actors classify and construct their understanding of the social world from particular positions in a hierarchically structured social space. An understanding of legal culture must involve an appreciation of the distribution of knowledge across the interpretive (or sub-interpretive) communities within the culture. The distribution of knowledge and the perception of that distribution from within the legal culture affect the way the legal culture produces and reproduces meanings. Discursive formations (such as a civil code or a constitution) function

<sup>61</sup> Dissent can even be internal to an individual as when there occurs a cleavage between thought and action.

<sup>62</sup> Tully, J (1995) *Strange Multiplicity* Cambridge University Press at 13 [emphasis original]. For a detailed statement arguing against the notion that culture is always and everywhere a fully integrated phenomenon, see Archer, MS (1996) *Culture and Agency* (2nd ed) Cambridge University Press. See generally Gelder, K (ed) (2005) *The Subcultures Reader* (2nd ed) Routledge.

<sup>63</sup> Said, EW *Culture and Imperialism* supra note 46 at xxv. This important point has been taken, unhelpfully, to deny the very existence of localism. See Eagleton, T (2000) *The Idea of Culture* Blackwell at 48: 'there is no such thing as local peculiarities. All localities are porous and open-ended, overlap with other such contexts'. Cf Latour, *Reassembling the Social* supra note 51 at 183: "whenever anyone speaks of [...] a 'global feature', [...] a 'world economy' [...], the first [...] reflex should be to ask: 'In which building? In which bureau? Through which corridor is it accessible? Which colleagues has it been read to? How has it been compiled?'. For a thorough consideration of 'hybridity' conferring a significant role to local knowledge, see Kraidy, M *Hybridity* supra note 51.

<sup>64</sup> Thompson, EP (1991) *Customs in Common* Penguin at 6.

<sup>65</sup> For the distinction between 'common' and 'intersubjective' meaning, see Taylor, C (1987) 'Interpretation and the Sciences of Man' in Rabinow, P and Sullivan, WM (eds) *Interpretive Social Science: A Second Look* University of California Press 57. The quotations are from id at 60, 57, and 57, respectively.

rhetorically through their narratological and tropological structures to prejudice judgment, elevating or protecting some elements in society by repressing others. They reveal certain hierarchies of power, of repressor and repressed, within the social fabric of the moment, whereby individuals feel the force of symbols and are led to behave according to them. Any comparative analysis of law, therefore, is also a cratology, that is, a study of power. But even the heterodox, antinomian, and rebellious orientations seeking to reconstitute from within the boundaries of collective identity do not detract from the existence of 'a system of cultural principles, a method of organizing and attributing meanings, a practice of cognitive mapping that is held, with little variability, by large numbers of people' within a given legal community.<sup>66</sup> Consider this well-known contribution to socio-psychological studies:

The political revolutionary does not refuse to cast his revolutionary songs in the modal structure and scale progressions of the culture he is in process of changing; his formations, if his organized forces are strong enough, will operate in terms of accepted patterns of military procedure. The one who rebels against the religious and moral system of his time will couch his appeals in the linguistic patterns of his people, use established affect symbols, and employ accepted aesthetic standards in heightening the responses of his followers.<sup>67</sup>

Secondly, culture defines a realm of possibility. Relative to a given socio-historical situatedness, certain values and visions cannot but constitute the ultimate horizons for what can plausibly be considered rhetorically convincing and morally acceptable: 'all aspects of social life are pervaded by decidedly non-neutral assumptions whose acceptance by a member of the culture define what is "possible" for that person'.<sup>68</sup> This observation recalls

<sup>66</sup> Ardit, G (1994) 'Geertz, Kuhn and the Idea of a Cultural Paradigm' (45) *British Journal of Sociology* 597 at 614. The fact is that differentiated thought within a legal culture or tradition must assume a measure of epistemological commonality if it is to lay any claim to cognitive (or political) effectivity: how could opposite positions speak to one another — or against one another — unless they were situated within a homogeneous epistemological field? For this argument, see Foucault, M (1997) 'Il faut défendre la société' Bertani, M and Fontana, A (eds) Gallimard at 185 (delivered as a course of lectures in March 1976 and published posthumously).

<sup>67</sup> Herskovits, MJ (1951) 'On Cultural and Psychological Reality' in Rohrer, JH and Sherif, M (eds) *Social Psychology at the Crossroads* Harper at 153. For an argument to the effect that even famous and influential 16th-century figures like Copernicus and Vesalius used classical models throughout their work and remained committed as fervently to traditional concepts as to empirical data, see Grafton, A (1992) *New Worlds, Ancient Texts* Harvard University Press at 115, where the author observes that '[b]oth Copernicus and Vesalius expected that their innovations could coexist with — and even rest on — the very structures we now see them as attacking'.

<sup>68</sup> Levinson, S (1988) *Constitutional Faith* Princeton University Press at 156 [emphasis original]. See also Young, IM *Justice and the Politics of Difference* supra note 9 at 45-46. For arguments in favour of strong cultural determinism, see Berger, BM (1995) *An Essay on Culture* University of California Press; Fish, S (1989) *Doing What Comes Naturally* Duke University Press at 430, 459, and 246; Rosaldo, R *Culture and Truth* supra note 12 at 25. For an influential reflection on how the self is constituted in important ways by group affinities, see generally Bourdieu, P (1979) *La distinction* Editions de Minuit passim; id (1980) *Le sens pratique* Editions de Minuit passim; id *Questions de sociologie* supra note 39 passim, where the author develops the notion of 'habitus' which he seems to have derived from Erwin Panofsky's work and which he presents as an array of permanent, transferable, limiting, and explanatory dispositions underwriting practices and images as they arise within a lived environment. Indeed, Bourdieu translated into French Panofsky's celebrated challenge to positivism which draws arresting parallels in terms of 'habit-forming forces' between the building of cathedrals and Aquinas's *Summa Theologiae*: id (1967) *Architecture gothique et pensée scolastique*, Bourdieu, P (trans) Editions de Minuit. For an acknowledgement of Bourdieu's indebtedness to Panofsky, see id at 142. For a helpful discussion

the significance of historical analysis for comparative legal studies; 'it is only through history that one can discover the conditions of possibility of psychological structures'.<sup>69</sup> Pierre Legendre remarks, for instance, that 'French law cannot produce or take into account just anything since it is linked to the mythical structure of nationalist truth'.<sup>70</sup> In other words, 'every cultural tradition is finitely elastic'.<sup>71</sup> I also claim that, even though cultural meanings are neither fixed nor static — '[c]ulture [...] is perpetually, unavoidably and unremediably *noch nicht geworden* (not-yet-accomplished)',<sup>72</sup> and '*tradere*', the etymological source of 'tradition', connotes that which is in movement — the adaptive dimension of culture must, despite its undoubted significance, be apprehended as subservient to the theme of cultural reproduction. Because a legal culture functions as an ongoing integrative process, what one encounters by way of an alternative experience is incorporated into an existing whole within which it is readily intelligibilised against the background of the whole, if at the cost of a measure of dissonance reduction. Indeed, the power of a culture inheres in its capacity to assimilate data through a didactic of conflict resolution operating in its favour, so that a new experience appears to conform to existing structures of thought and belief. Resorting to powerful imagery, Algirdas Greimas thus highlights the matter of 'cultural persistence', or perhaps inertia, by equating 'legal culture' with "'good legal manners" (in the way there are table or conversation "manners", etc.)'.<sup>73</sup> But this idea emphatically fails to sustain the assumption that 'culture' encompasses some sort of reactionary doctrine embodying 'sentiment for place, nostalgia for tradition, preference for tribe, reverence for hierarchy'.<sup>74</sup>

This is not to say that the comparatist-at-law should suppress all traces of an intentional structure of practice and reduce practice exclusively to temporally non-emergent constraints, that is, to constraints that are stable over time (Andrew Pickering rightly mocks a notion of 'tacit knowledge' that would be 'hovering nonemergently in some special epistemic heaven and controlling practice from without').<sup>75</sup> Of course, the idea of a community being incarcerated in a place or in a mode of thought is a fiction of the anthropological imagination. Communities should not be unduly typified through a static and univocal notion of 'culture'. Even Edward Sapir's 'classic' perspective warned against this danger:

The so-called culture of a group of human beings [...] is essentially a systematic list of all the socially inherited patterns of behavior which may be illustrated in the actual behavior of all or most of the individuals of the group. The true locus,

---

of Bourdieu's idea of '*habitus*', see Swartz, D (1997) *Culture and Power* University of Chicago Press at 95-116. Interestingly, Bourdieu has observed that 'culture' would be 'a better term than *habitus*'. However, he thought that the notion was 'overdetermined': Bourdieu, P (1968) 'Structuralism and Theory of Sociological Knowledge' (35) *Social Research* 681 at 706, note 23.

<sup>69</sup> Foucault, M (1954) *Maladie mentale et psychologie* Presses Universitaires de France at 90 [*C'est dans l'histoire seulement que l'on peut découvrir les conditions de possibilité des structures psychologiques*].

<sup>70</sup> Legendre, P (1976) *Jouir du pouvoir: traité de la bureaucratie patriote* Editions de Minuit at 72 [*'Le droit français ne saurait produire ni prendre en compte n'importe quoi, car il est lié à la structure mythique de la vérité nationaliste*].

<sup>71</sup> Bohannan, P (1995) *How Culture Works* Free Press at 167.

<sup>72</sup> Bauman, A and Tester, K (2001) *Conversations with Zygmunt Bauman* Polity at 32. The words are Bauman's.

<sup>73</sup> Greimas, AJ (1976) *Sémiotique et sciences sociales* Le Seuil at 111 [*'de "bonnes manières juridiques" (comme il existe des "manières" de table, de conversation, etc.)*].

<sup>74</sup> Eagleton, T *The Idea of Culture* supra note 63 at 30.

<sup>75</sup> Pickering, A (1995) *The Mangle of Practice* University of Chicago Press at 200.

however, of these processes which, when abstracted into a totality, constitute culture is not in a theoretical community of human beings known as society, for the term 'society' is itself a cultural construct which is employed by individuals who stand in significant relations to each other in order to help them in the interpretation of certain aspects of their behavior. The true locus of culture is in the interactions of specific individuals and, on the subjective side, in the world of meanings which each one of these individuals may unconsciously abstract for himself from his participation in these interactions. [...] It is impossible to think of any cultural pattern or set of cultural patterns which can, in the literal sense of the word, be referred to society as such. There are no facts of political organization or family life or religious belief or magical procedure or technology or aesthetic endeavor which are coterminous with society or with any mechanically or sociologically defined segment of society.<sup>76</sup>

In other words, the presence of socially differentiated knowledges, discourses, and meaning systems within a culture should be recognised, and the contestatory nature of discourses within communities ought to be acknowledged. And it is the case that, even as it reproduces itself, culture changes on account of the fact that the frameworks which it delineates and within which it operates are inevitably modified as they consider new empirical data. However, since present situations are addressed in terms of past experiences, only exceptionally will the new information effectively *challenge* the whole. As a leading naturalist reminds us, '[c]ulture conforms to an important principle of evolutionary biology: most change occurs to maintain the organism in its steady state'.<sup>77</sup> And if psychoanalysis is to be credited with any discoveries, one is surely that our psychological state, our past experience, and our memories curtail our field of action such that we only enjoy interstitial freedom.

In the end, therefore, while I am certainly not defending the view that the old dichotomy of structure and agency should be resolved in favour of a complete incapacitation of the power of choice, of a de-identification of self, I do maintain that there is an important sense in which individual identity is supervenient upon unchosen participation in common forms of life, that the life of a culture determines the resources of perception, that there exists at the very least something like 'cultural suggestibility'. Furthermore, such overdetermination increases over time as the sphere of elective choice progressively contracts itself.<sup>78</sup> Thus, Marc Galanter notes that 'legal cultures, like languages, can absorb huge amounts of foreign material while preserving a distinctive structure and flavor'.<sup>79</sup> In any event, there is simply no such thing as the unencumbered self creating itself by acts of will unmediated by any constitutive cultural inheritance.<sup>80</sup> Because individuality

<sup>76</sup> Sapir, E (1949) [1932] 'Cultural Anthropology and Psychiatry' in Mandelbaum, DG (ed) *Selected Writings in Language, Culture, and Personality* University of California Press at 515.

<sup>77</sup> Wilson, EO (1997) *In Search of Nature* Allen Lane at 107. This quotation, which I find helpful, ought not to suggest adhesion to Wilson's cosmology.

<sup>78</sup> See Bohannan, P (1997) 'Ethnography and Comparison in Legal Anthropology' in Nader, L (ed) *Law in Culture and Society* (2nd ed) University of California Press at 405: 'a cultural tradition has a character that becomes "more so" as it develops'. Ultimately, it cannot be denied, of course, that 'past endurance tells us nothing about what will happen tomorrow': Pickering, A *The Mangle of Practice* supra note 75 at 207.

<sup>79</sup> Galanter, M (1994) 'Predators and Parasites: Lawyer-Bashing and Civil Justice' (28) *Georgia Law Review* 633 at 680.

<sup>80</sup> In his blazing version of this assertion, Marx claims that '[t]he tradition of all the dead generations weighs

is produced through culture, personal style is never more than a deviation in relation to the style of a group, so that it always relates back to the common style either through its conformity with it or on account of its difference from it.

An additional cluster of observations is apposite as regards the matters of cultural uniformity and constraint, so as to emphasise that the individual mind, although shaped by culture, is itself the principal *agent* of dissemination of cultural models — an idea which the notion of '*mentalité*' is meant to sustain. The point is that culture, or units of cultural transmission, do not partake in some transcendent, supra-individual entity — an idea that would raise insuperable conceptual difficulties.<sup>81</sup> To account for cultural understanding being regulated and maintained, it is important to grasp the idea of 'culture' as effect rather than cause. In other terms, culture exists as a *result* of there being a cognitive and affective apparatus within the individual, which is similar for a number of individuals who engage in sustained social interaction and communication amongst themselves. The process of cultural dissemination operates through units of transmission of information and know-how, which are diffused in human beings via social learning, that is, by way of observation, imitation, and communication. It is these 'memes' — as Richard Dawkins, playing on the Greek term '*mimesis*' and the word 'gene', has somewhat infelicitously named the relevant cognitive structuring mechanisms<sup>82</sup> — which we inherit from individuals around us and which we transmit to individuals with whom we come into contact. Thus, 'what is cultural consists of widely spread and long-lasting memetic features of individual members of the culture [in which the memes possessed by the members of the present interpretive community can be seen as linked through a chain of communication and education with the memes of earlier members], just as the species consists of the widely spread and long-lasting genetic traits of individual members of the species'.<sup>83</sup> (The parallel with genetic units of inheritance is imperfect, for in principle an individual only gets genes from his parents and can transmit them only to his children.) The shared perspective amongst the members of a culture is the *result* of individuals being inhabited by populations of similar memes. The traditionary features that constitute individual autonomy and identity within a community are thus a *consequence* of the presence of infra-individual entities carried by biological vehicles deep inside the mind which, while they mutate and develop as they disseminate, ensure the preservation of culture.<sup>84</sup> In sum, the crucial role assumed by the individual within a culture can hardly be overstated, even as culture transforms him.

Once the embeddedness of the law is taken seriously, the explanatory model on offer from established comparative legal studies rapidly begins to look deeply unsatisfactory. In the realisation that conceptions of law-as-rules-or-precepts are impoverished, the comparatist

---

like a nightmare on the brain of the living': Marx, K (2000) [1852] *The Eighteenth Brumaire of Louis Bonaparte* in *Karl Marx: Selected Writings* (2nd ed) McLellan, D (ed) Oxford University Press at 329. For the original text, see id *Der achtzehnte Brumaire des Louis Bonaparte* in Marx, K and Engels, F (1985) *Gesamtausgabe* [MEGA] t I vol 11 Dietz at 97 [*Die Tradition aller todtten Geschlechter lastet wie ein Alp auf dem Gehirne der Lebenden*].

<sup>81</sup> See Balkin, JM (1998) *Cultural Software* Yale University Press at 8-10.

<sup>82</sup> Dawkins, R (1989) *The Selfish Gene* (2nd ed) Oxford University Press at 192. The designation is unfortunate, because it may suggest that cultural transmission involves perfect replication, which it emphatically does not, if only on account of the fact that a process of memorisation is at work. For a critical observation along these lines, see Sperber, D (1996) *Explaining Culture* Blackwell at 105-06.

<sup>83</sup> Balkin, JM *Cultural Software* supra note 81 at 49-50.

<sup>84</sup> For a detailed introduction to memetic development, see id at 42-97. I am much indebted to this account for my own. *Adde*: Blackmore, S (1999) *The Meme Machine* Oxford University Press.

is attracted to the explicatory power that an appreciation of the 'legal' as culturally (or traditionally) constituted may yield. Admittedly, neither culture nor tradition can ever be totally articulated on the basis of indubitable evidence. But the indeterminacy of culture (or tradition) or, if you will, the impossibility of distinguishing between culture and non-culture (or tradition and non-tradition) in a way that would allow the identification of empirically verifiable causal or ontic relationships through which control over social life could be effectively attained ought to be a handicap only for the positivist seeking the kind of clear and determinate guidance usually associated with computer programmes. Appreciating that '[understanding] is a notion far removed from the world of statistics and causal laws',<sup>85</sup> comparative legal studies wishes to subscribe to a very different cognitive project and wants to pursue a very different account of significance. The comparative enterprise does not purport to be serviceable in the sense of providing an instrumental programme oriented towards technical ends. In the way in which they seek to establish the other-in-the-law's views and the legitimacy of these views, comparatists-at-law aim to offer a diagnostic.<sup>86</sup> For comparatists-at-law, plausible explanations, then, can be more profitable, and hence preferable, to causal demonstrations.<sup>87</sup> In fact, comparative analysis of law is best apprehended as a hermeneutical investigation aiming to achieve understanding about the life of the law and life-in-the-law through the elucidation of meaning. To be sure, such understanding may then be used to encourage new forms of problem-solving. Yet, it remains the case that the primary role of comparative legal studies is to awaken assumptions, that is, to answer an 'emancipatory' interest.<sup>88</sup>

<sup>85</sup> Winch, P (1990) *The Idea of a Social Science* (2nd ed) Routledge and Kegan Paul at 115. See generally Taylor, C 'Interpretation and the Sciences of Man' supra note 65 at 33-81. This claim has been made with specific reference to culture in Barkow, J *Darwin, Sex, and Status* supra note 57 at 142: 'Culture is not a "thing", not a concrete, tangible object. It isn't a cause of anything'. For a critique insisting upon the fact that the notion of 'legal culture', being devoid of causal significance, is maddeningly imprecise and arbitrary, so that it lacks 'sufficient analytical precision [...] to allow it to indicate a significant explanatory variable in empirical research', see Cotterrell, R (1997) 'The Concept of Legal Culture' in Nelken, D (ed) *Comparing Legal Cultures* Dartmouth 14 and passim. For recent re-formulations of this thesis, see id 'Comparatists and Sociology' supra note 59 at 147-51; id (2004) 'Law in Culture' (17) *Ratio Juris* 1. It is interesting to note, however, that the relevance of culture (or tradition) is not limited to 'soft' subjects, but is also regarded (by some analysts at least) as crucial for economic theory concerned as it is with predictability and quantifiable accuracy. See, eg, North, DC (1990) *Institutions, Institutional Change and Economic Performance* Cambridge University Press; Knight, J and North, D (1997) 'Explaining Economic Change: The Interplay Between Cognition and Institutions' (3) *Legal Theory* 211; David, PA (1985) 'Clio and the Economics of QWERTY' (75) *American Economic Review* 332, who argues that there are path-dependent sequences of economic changes, that is, 'non-ergodic' processes, that are inherently historical in character and where contingent elements rather than systematic forces play a dominant role. For an argument to the effect that the amorphous character of cultures makes them neither indecipherable nor insubstantial, see Rosen, L (1991) 'The Integrity of Cultures' (34) *American Behavioral Scientist* 594.

<sup>86</sup> For an insightful argument in favour of a diagnostic approach to understanding, see Rose, N (1999) *Powers of Freedom* Cambridge University Press at 55-60. The idea draws inspiration from Nietzsche's 'philosopher as cultural physician': Nietzsche, F (1979) [1873] 'The Philosopher as Cultural Physician' in Breazeale, D (ed and trans) *Philosophy and Truth* Humanities Press International at 67-76 For the original text, see id (1922) 'Der Philosoph als Arzt der Cultur' in *Friedrich Nietzsche Gesammelte Werke [Musarionausgabe]*, vol VI Musarion at 65-74.

<sup>87</sup> See Appendix I.

<sup>88</sup> Habermas, J (1971) [1968] *Knowledge and Human Interests* Shapiro, JJ (trans) Beacon Press at 302-17. The original expression reads as 'emanzipatorische[s] Erkenntnisinteresse': id (1971) *Technik und Wissenschaft als Ideologie* Suhrkamp at 155. Cf Fletcher, GP (1998) 'Comparative Law as a Subversive Discipline' (46) *American Journal of Comparative Law* 683.



Comparative analysis of law wishes to liberate individuals dwelling within the realm of intelligibility into which they have been socialised from confining and repressive forces regarded by them as natural rather than as socially constructed. It can do so by heightening awareness of the constraints imposed by a symbolic 'system' and by helping to overcome the closing of the mind otherwise generated by habit or socialisation. It is, ultimately, engaged in a phenomenological inquiry of what is *possible* for a legal community and the semiotic sub-groups it harbours, such as practitioners, judges, and academics. Indeed, one cannot afford to study legal experience without examining what kind of legal experience is possible, for culture (or tradition) limits possibilities of experience: *it constrains*. In this sense, culture (or tradition) is both a liminal and a finite space. At a more general level, comparative-legal-studies-as-hermeneutics intends to counteract (latent) ethnocentrism. A re-presentational strategy seeking critical enlightenment in this way hardly suffers from the notion of 'culture' (or 'tradition') not being ascribed a restricted and precise meaning *qua* mechanistic explication of experience. The malleability — or 'dereferentialization'<sup>89</sup> — surrounding the notion of 'culture' (or 'tradition') does not prevent the ascription of determinative efficacy and the articulation of various characteristics that can prove of direct relevance to the pursuit of deep or thick comparative legal studies.<sup>90</sup>

Legal experience is immersed in a cultural context: it is modulated. It is indeed the legal culture — a notion that makes specific reference to the sub-culture that is constituted amongst law specialists, especially as regards the repository of those elements that partake in the stable, general, and unconscious — that provides the 'internal logic' of the law.<sup>91</sup> Although groups and identities are necessarily fluid, the legal culture remains the cement that binds normality and normativity, that accounts, through the posited law, for a 'governmentalité' (a useful notion which connotes at once the ideas of government, governance, and *mentalité* — understood here against a background of non-mental coping that could be captured through the idea of the 'legal unconscious').<sup>92</sup> The goal for the

<sup>89</sup> Readings, B (1996) *The University in Ruins* Harvard University Press at 178.

<sup>90</sup> In this sense, the stigmatisation of the 'flabbiness' of culture misses the point. The word is in Eagleton, T *The Idea of Culture* supra note 63 at 37. How is the fact that culture covers 'everything from hairstyles and drinking habits to how to address your husband's second cousin' or 'Igor Stravinsky' or 'the way of life of Turkish physiotherapists' — or, to use another array of illustrations, that it ranges effortlessly from 'pornography and Pop Tarts to papal encyclicals and *The Pirates of Penzance*' — problematic for comparatists-at-law if, within the sphere of comparative research, it allows 'to rescue the "said" of [legal] discourse from its perishing occasions and fix it in perusable terms'? The quoted sentence is in Geertz, C *The Interpretation of Cultures* supra note 36 at 20. As Inglis puts it, '[c]ulture, even when indiscriminate, retains moral force, aesthetic authority, practical usefulness': Inglis, F *Culture* supra note 37 at 135. The strings of examples are in Eagleton, T *The Idea of Culture* supra note 63 at 32, and LaCapra, D (2004) *History in Transit* Cornell University Press at 210, respectively.

<sup>91</sup> Merryman, JH (1978) 'On the Convergence (and Divergence) of the Civil Law and the Common Law' in Cappelletti, M (ed) *New Perspectives for a Common Law of Europe* Sijthoff at 224. See also Örüücü, E (1987) 'An Exercise on the Internal Logic of Legal Systems' (7) *Legal Studies* 310.

<sup>92</sup> See Foucault, M (1994) [1978] 'La "gouvernementalité"' in *Dits et écrits, 1954-1988* vol III Defert, D and Ewald, F (eds) Gallimard at 635-57. For a thoughtful study of 'governmentality', see Dean, M (1999) *Governmentality* Sage. The idea of the 'legal unconscious' emerges throughout the work of Pierre Legendre as he purports to assert its impact on the conditions of possibility of French legal thought — no doubt one of the reasons why his publications continue to be ignored by French academics while they are translated and published abroad. For example, see Legendre, P (1983) *L'empire de la vérité* Fayard at 21: 'the unconscious is a lawyer too' [*L'inconscient lui aussi est juriste*]. For salient illustrations of Legendre's thought, see Legendre, P (2005) *L'amour du censeur* (2nd ed) Le Seuil; id *Jour du pouvoir* supra note 70; id (1992) *Les enfants du texte* Fayard. For an excellent introduction in English to Legendre, see Goodrich, P (1997) (ed and trans) *Law and the Unconscious: A Legendre Reader* Macmillan. For a general reflection on the necessary and constitutive role of the unconscious in

comparatist is to re-present a legal culture in ways that have greater interpretive power than is offered by the traditional rule-based model. In other words, the idea is to refuse to take rules or precepts as a given and to try to see how they are conditioned and shaped by contingent (ie, non-necessary, rather than stochastic) epistemic patterns directed to practices and values – and, perhaps, how they sustain and amplify these in their turn. The comparatist's range of options in the pursuit of his task is vast since there is nothing for the observer of a legal culture that is quintessentially 'legal' (or that is quintessentially outside the 'legal'): *il n'y a pas de hors-droit*.<sup>93</sup> Rather, the quality of 'legality' (if this be the apposite word) is conferred to the 'object' of observation – the *comparandum* – on the basis of what the comparatist understands that the observed culture understands as 'legal' and, also, in the light of what he himself understands as 'legal'. The perception of law as cultural phenomenon thus moves comparative legal studies away from the appropriation by the comparatist of a seemingly autarkic body of knowledge (the legal rules or precepts) which has no concern for the practices giving rise to it – these practices themselves being the product of a pre-formulated cultural network of understandings. The expansive approach to comparison that I advocate, which harnesses culture as 'a theoretical tool for developing sensitivity for differentiation, inconsistency, confusion, conflict, and contradiction', is therefore significantly more exacting than the ones that depend merely on neatly circumscribable rule-based explanations.<sup>94</sup> Indeed, '[a] cultural study of law's rule warns us *not to take any comparisons for granted*'.<sup>95</sup>

Critics of culture claim that the idea suggests autarky, holism, homogeneity, stability, coherence, and boundedness in a context where social interaction is characterised by relationality, fragmentation, conflict, change, discontinuity, equivocality, and porosity. Not unlike the notion of 'race', culture would tend to 'freeze' difference.<sup>96</sup> There is no doubt that culture is a construct or an abstraction in the sense that the word does not refer to any concrete 'reality': one cannot see a culture. It is the comparatist who must *effectuate* the cultural, which is assumed to be present, if he is going to be able to use it as an interpretive device to convey the 'situational rootedness' of meaning,<sup>97</sup> that is, to deploy

---

the fashioning of political identity and destiny, see Rose, J (1996) *States of Fantasy* Oxford University Press. Adde: Minsky, R (2005) *Psychoanalysis and Culture* Polity; Belsey, C (2005) *Culture and the Real* Routledge.

<sup>93</sup> I adopt and adapt Derrida, J *De la grammatologie* supra note 32 at 227 [*'Il n'y a pas de hors-texte'*]. Derrida's words could be translated as '[t]here is no out-of-text'. This becomes, here, 'there is no out-of-law'. See, eg, Wilson, G 'English Legal Scholarship' supra note 57 at 831: 'It would be unwise for example 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'.

<sup>94</sup> Alvesson, M (1993) *Cultural Perspectives on Organizations* Cambridge University Press at 120.

<sup>95</sup> Kahn, PW (2003) 'Freedom, Autonomy, and the Cultural Study of Law' in Sarat, A and Simon, J (eds) *Cultural Analysis, Cultural Studies, and the Law* Duke University Press at 176 [my emphasis].

<sup>96</sup> Abu-Lughod, L (1991) 'Writing against Culture' in Fox, RG (ed) *Recapturing Anthropology* School of American Research Press at 144. See also Kuper, A (1999) *Culture* Harvard University Press; Brightman, R (1995) 'Forget Culture: Replacement, Transcendence, Relexification' (10) *Cultural Anthropology* 509; Fox, RG and King, BJ (eds) *Anthropology Beyond Culture* Berg; Crehan, K (2002) *Gramsci, Culture and Anthropology* University of California Press; Bayart, J-F (2005) *The Illusion of Cultural Identity* Rendall, S et al (trans) University of Chicago Press. Other prominent critiques include Clifford, J (1988) *The Predicament of Culture* Harvard University Press; id (1997) *Routes* Harvard University Press.

<sup>97</sup> Hannerz, U (1992) *Cultural Complexity* Columbia University Press at 22.

it as 'information'.<sup>98</sup> This intervention involves a dimension of reification: *the comparison realises a legal culture*, that is, it crystallises culture through the acts of apprehension and production.<sup>99</sup> It does so by labelling as 'cultural' a lived constellation of meanings and values which is actively created and constituted within the situated context of the lifeworld of the community under observation. This means, of course, that the identification of certain features of the lifeworld as 'cultural' can only be more or less persuasive and can never be 'true'.<sup>100</sup> It is precisely this artificial and, therefore, contestable aspect of culture that its detractors use as a target. To reject culture, however, is to accept that identifiable ways of feeling, thinking, and acting are randomly distributed across individuals, or that they are strictly determined by biological heredity — both hypotheses having been disproved by anthropological research. To those who do not like the idea of 'culture', I ask: what is your competing model of social cohesion? Or do you not like the idea of 'social cohesion' either?<sup>101</sup> Despite the dangers associated with simplification and reification, I argue that, just as one can usefully speak of 'the Gothic style', '[t]here are many situations in which "Japanese culture" is a convenient shorthand for designating something like "that which many or most Japanese irrespective of gender, class, and other differences regularly think, feel, and do by virtue of having been in continuous social contact with other Japanese"'.<sup>102</sup> Referring to 'culture' in this way does not automatically privilege coherence, does not imply stultification, does not entail essentialism, does not exaggerate distinctness, does not preclude temporal variation, does not efface individual variations or contestations that can take the form of participation in a range of sub-cultures, does not fetishise identity such that it would lay beyond critique, and certainly does not cast its advocates as some reactionary minority.<sup>103</sup> Let me insist that culture need not be understood as positing a number of discrete heritages organically tied to specific homelands and considered best kept separate (like the laboratory specimens in petri dishes we also call 'cultures'). Nor does culture need deny their cosmopolitanism to the people being studied. In other words, culture allows for a transnational public sphere and need not connote nationalism or isolationism, that is, something like 'cultural fundamentalism'. Nor does culture require to be linked to ethnicity or race or gender. Again, the point is simply to acknowledge that '[e]verywhere we find sets of certain learned features that are shared more extensively by people who interact with each other than between these people and others with whom

<sup>98</sup> Lotman, J (12 October 1973) 'Different Cultures, Different Codes' *The Times Literary Supplement* 1214.

<sup>99</sup> Berger, PL and Luckmann, T (1966) *The Social Construction of Reality* Penguin at 173. For a reflection advocating the necessity and value of reification as an analytical instrument, see Berger, BM *An Essay on Culture* supra note 68 at 69-72.

<sup>100</sup> See Clifford, J (12 January 1997) 'The Truth is a Moving Target' *The New York Times Book Review* 13: 'Cultural knowledge, both local and comparative, is a moving target, the product of continuing and open-ended dialogues'. Accordingly, '[n]o one gets the last word'.

<sup>101</sup> An argument has indeed been introduced linking the uneasiness vis-à-vis culture to the fact that it would be seen as replacing liberal theory and the view of individuals as autonomous and self-interested rationalists and thus as challenging the idea of unfettered individual identity and agency. See Boggs, JP (2004) 'The Culture Concept as Theory, in Context' (45) *Current Anthropology* 187.

<sup>102</sup> Brumann, C (1999) 'Writing for Culture' (40) *Current Anthropology* 51 at 57. My summary owes much to this paper.

<sup>103</sup> For various aspects of the well-taken, and well-rehearsed, case against the essentialisation of culture, see, eg, Fuchs, S (2001) *Against Essentialism: A Theory of Culture and Society* Harvard University Press; Tully, J *Strange Multiplicity* supra note 62 at 7-17; Parekh, B (2000) *Rethinking Multiculturalism* Harvard University Press at 76-79; Benhabib, S (2002) *The Claims of Culture* Princeton University Press at 1-23; Appiah, KA (2005) *The Ethics of Identity* Princeton University Press at 107 and passim.

they do not interact or among those others'.<sup>104</sup> And the further point is to appreciate that French culture, for example, does not exist separately from other cultures as if fashioned through some inner essence. Rather, it exists *characteristically* in *relation* to other cultures. The fact that the notion of 'culture' can be abused by those who caricature the patterning and uniformity of human action, the fact even that such an extreme event as the Holocaust can be regarded as a form of culture-consciousness is no reason to jettison culture. Who would consider no longer resorting to the word 'democracy' because the Soviet regime abused it for much of the 20th century?

There are two more sets of observations that I want to present to lawyers.

In no way does the programme that I defend in support of differential analysis of jurisprudences propose to dispense with the usual legal artifacts such as statutes and judicial decisions. Indeed, my claim is precisely that cultures are to be found at work, so to speak, in statutes and judicial decisions, which must therefore remain one of the principal foci of study for comparative legal studies. What I argue is that the posited law can no longer stand as the point of arrival for comparatists-at-law. Rather, comparative interventions must be transformed, so that the posited law is regarded as a point of departure leading to the questions 'how' and 'why?' and, later, to insightful elucidation. The posited law must not be something at which comparison stops, but something from which comparison begins its *presencing*.<sup>105</sup>

But perhaps the key issue for individuals socialised in the law is that '[they] have long been accustomed to think of law as something apart': '[t]he grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary, disordered paths of life'.<sup>106</sup> The assumption is that if one has culture, one cannot have justice (or reason). In other words, the claim is that justice cannot emerge from localism, which is deemed to be prejudiced or biased — 'prejudice', of course, being considered a bad thing. The first order of business for comparatists trained as lawyers must therefore be to appreciate that '[t]o say that the law is cultural does not by itself dismantle the force of the idea of justice'.<sup>107</sup> Rather, culture comes as 'a kind of epistemological corrective to the plethora of problems posed for postrealist legal studies by the crises of the social liberal state and its allied forms of knowledge'.<sup>108</sup> For lawyers, to turn to culture is to embrace the late modern era's turn from a 'social' to a 'cultural' logic of governance.<sup>109</sup> More importantly,

<sup>104</sup> Brumann, C 'Writing for Culture' supra note 102 at S9.

<sup>105</sup> For a recent argument to the effect that comparatists, even as they embark upon cultural analyses, must not abandon the examination of the technicalities of the law, see Riles, A (2005) 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (53) *Buffalo Law Review* 973.

<sup>106</sup> Post, R (1991) 'The Relatively Autonomous Discourse of Law' in id (ed) *Law and the Order of Culture* University of California Press at vii.

<sup>107</sup> Greenhouse, CJ (1989) 'Just in Time: Temporality and the Cultural Legitimation of Law' (98) *Yale Law Journal* 1650 at 1650.

<sup>108</sup> Sarat, A and Simon, J (2003) 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship' in id (ed) *Cultural Analysis, Cultural Studies, and the Law* Duke University Press at 4. For a particularly prominent argument on the death of the social, see Baudrillard, J (1983) *In the Shadow of the Silent Majorities... or the End of the Social* Foss, P, Patton, P and Johnston, J (trans) Semiotext(e). But these claims are not uncontroversial. Already, in their introduction to Bonnell, VE and Hunt, L (eds) (1999) *Beyond the Cultural Turn* University of California Press, the editors acknowledge how '[m]ore and more often, [social historians and historical sociologists] devised research topics that foregrounded symbols, rituals, discourse, and cultural practices rather than social structure or social class' (at 8). But they lament the threat 'to efface all reference to social context or causes' and the lack of 'foundations' of cultural methods (at 9-10) while pleading for a reassertion of the social (at 14).

<sup>109</sup> Sarat, A and Simon, J 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship' supra

it is to acknowledge that *recognition of local specificity is the condition for justice*. In Derrida's arresting formulation, '[i]l y va d'un certain pas'.<sup>110</sup> These words can refer to at least three ideas. Not only do they mean to say that one is walking at a certain pace (suggesting, for example, forward movement), but they also intimate the taking of a step. Most significantly (and most enigmatically), though, they convey that negation is at stake ('pas' in French also means 'not').

For comparatists-at-law to turn to culture (or tradition) is indeed to engage in an exercise in negative dialectics (in the sense at least of an anti-Hegelian or anti-*Aufhebung* dialectics) since it is to develop a cultural argument meant to negate clearly and emphatically the positivistic, scientific, and propositionally methodological enterprise that (establishment-minded) comparative legal studies has wanted to be. Negativity, far from suggesting a 'mood' — one need not be a negative person in order to foster negative dialectics — is a disposition or a dis-position, a distrust of positing, positivity, positivists, and the positivistic *Zeitgeist*, which must be *ex-posed* as the most important factor suppressing the cultural dimension of meaningful experience within comparative analysis. In this sense, negativity epitomises the transformative role of theory as counter-discourse. It effectuates a politics of resistance. It is transgressive (not strictly in a cathartic sense, although it would be unwise to obfuscate the constructive value that the purgative dimension may hold) but in an ecstatic mode, in other terms, in the way it is 'critically promot[ing] progressive social transformation'.<sup>111</sup> It is, literally, an *undisciplined* gesture.<sup>112</sup> It is *contrarian* — which is precisely how, in Jacques Derrida's words, 'negativity is a resource'.<sup>113</sup>

(As I advance an argument in favour of a comparative legal studies, I do not wish to minimise the challenge associated with the 'escape' from 'small thinking', from the 'small frame' within which lawyers-as-comparatists — for whom culture means suffocation of legal discourse under a blob of holism — have been 'spend[ing] their time

---

note 108 at 1-34. For other noteworthy arguments defending the centrality of 'culturalism' within the logic of late capitalism, see, eg, Balibar, E (1991) 'Is There a "Neo-Racism"?' in Balibar, E and Wallerstein, I (eds) *Race, Nation, Class* Turner, C (trans) Verso at 17-28; Touraine, A (2005) *Un nouveau paradigme* Fayard. For recent claims making specific reference to legal discourse, see Kahn, PW (1999) *The Cultural Study of Law* University of Chicago Press; Rosen, L (2006) *Law as Culture: An Invitation* Princeton University Press; Chase, OG (2005) *Law, Culture, and Ritual* New York University Press.

<sup>110</sup> Derrida, J (1996) *Apories Galilée* at 23 [emphasis original].

<sup>111</sup> Huntington, PJ (1998) *Ecstatic Subjects, Utopia, and Recognition* SUNY Press at 10-11 and *passim*. See Fabian, J (2001) *Anthropology with an Attitude* Stanford University Press at 7, 100, and 93. Negative dialectics, in the expression made famous by Theodor Adorno, refers to a critical mode of reflection which at crucial moments — those moments in the production of knowledge that call upon one to take positions that determine how one gets from one step to the next, from one statement to the next, from one sentence to the next — negates what a discipline affirms. See generally Adorno, TW (1973) *Negative Dialectics* Ashton, EB (trans) Routledge. *Add:* Buck-Morss, S (1977) *The Origin of Negative Dialectics* Free Press; O'Connor, B (2004) *Adorno's Negative Dialectic* MIT Press. It is worth emphasising that 'negativity' has nothing whatsoever to do with narratives of decline Adorno's insight, see Legrand, P (2005) 'Comparative Contraventions' (50) *McGill Law Journal* 669.

<sup>112</sup> According to Adorno, such intervention will be 'punish[ed]': Adorno, TW *Negative Dialectics* *supra* note 111 at 56. For the original text, see id (1966) *Negative Dialektik* Suhrkamp at 65 ['*ahnden*']. For a narrative vindicating Adorno's insight, see Legrand, P (2005) 'Comparative Contraventions' (50) *McGill Law Journal* 669.

<sup>113</sup> Derrida, J (1967) *L'écriture et la différence* Le Seuil at 381 ['*la négativité est une ressource*'] (emphasis original). Cf Keats, J in (1958) *The Letters of John Keats* vol I Rollins, HE (ed) Harvard University Press at 193: 'at once it struck me, what quality went to form a Man of Achievement [...] — I mean *Negative Capability*, that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact and reason' [emphasis original] (letter to his brothers, George and Tom Keats, dated 21 or 27 December 1817).

recovering endless bits of legal data so as to integrate them into extremely massive and intricate, but ephemeral and unenlightening, compendiums and commentaries stating what the law is', here or elsewhere. After all, '[t]o [have been] legally trained is to [have undergone] a serious reduction of one's cognitive possibilities' — not something which the habitual preoccupations with secure professional identity and boundary maintenance make readily remediable.<sup>114</sup> Nor do I wish to belittle the challenge attendant upon a de-transcendentalisation or 'secularisation' of comparative orthodox discourse (I have in mind, specifically, the difficulties surrounding any demise of the tenacious claim to universalism and to its valued corollary, truth.)

### III SELECTED ASPECTS OF COMPARATIVE ORTHODOXY (SUCH AS TRUTH)

One believes or wants the text to mean what one wants or believes. This search for non-difference is the strongest censorship.

Jean Bollack<sup>115</sup>

[T]he adequate language in which we can understand another society is not our language of understanding.

Charles Taylor<sup>116</sup>

Consider the orthodox approach to comparative legal studies, that which is familiar to readers of specialised journals and books in the field; that which focuses on state-sponsored expressions of what is apprehended as the characteristically 'legal' (primarily, legislative enactments and reported appellate judicial decisions); that which engages in the juxtaposition of substantive and adjectival posited law; that which ascribes significance to the placement of the 'legal' within formalised classificatory schemes; that which relegates all traces of the enculturation (or traditionality) of law to some place *beyond* (or is it *beneath*?) the 'legal'; that which makes no attempt to discern the complications associated with the act of comparison and with the modes of alienation of the comparatist; that which assumes foreign law to be unproblematically 'out there', a stable referent, its meanings uniformly present for any self-styled 'comparatist', waiting to be discovered from a fixed transcendental vantage point; that which, ultimately, seems to advocate how *easy* it is to pursue comparative work about law, for, after all, one only has to compare; that which, as it struggles to harness elusive if obstinate misprisions, evidences a field compromised by endemic problems of intellectual credibility (although, we are told, 'comparatists all over the world are perfectly unembarrassed about their methodology').<sup>117</sup>

<sup>114</sup> The quotations are from Schlag, P *The Enchantment of Reason* supra note 29 at 144, with the exception of the last one, which is at id at 143-44.

<sup>115</sup> Bollack, J (2000) *Sens contre sens* La passe du vent at 179-80 [*On croit ou l'on veut que le texte signifie ce que l'on veut ou croit. C'est la censure la plus forte que cette recherche de la non-différence*].

<sup>116</sup> Taylor, C (1985) *Philosophy and the Human Sciences: Philosophical Papers 2* Cambridge University Press at 125.

<sup>117</sup> Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd rev ed) Weir, T (trans) Oxford University Press at 33. For the original text, see id (1996) *Einführung in die Rechtsvergleichung* (3rd ed) JCB Mohr at 31 [*die Rechtsvergleicher in aller Welt (stehen) ihren Methoden durchaus unbefangen (...) gegenüber*].

I extract the following illustration from the English edition of Hein Kötz's authoritative textbook.<sup>118</sup> Having offered a seven-page examination of the posited law regarding 'offer and acceptance' in nine jurisdictions, Kötz reaches the following conclusion: 'This comparative survey has shown that the [English, French, and German] systems attach different legal consequences to the issuance of an offer. [...] The critic is forced to conclude that on this point the German system is best'.<sup>119</sup> I argue that these words — uttered within a strictly positivistic framework (and attesting to a disquieting lordly assurance) — efface the differential dynamics of the law, banalise the law's factual moorings, detach the law from the cultural (or traditional) configurations in which it is always-already embedded, reify life-in-the-law. Indeed, Kötz advocates that all 'solutions' apprehended by the comparatist should be 'freed from the context of [their] own system', that is, that they should be 'cut loose from their conceptual context and stripped of their national doctrinal overtones'.<sup>120</sup> Through discursive practices that seem deceptively benign but that effectively assume extensive technical, mechanistic power over alterity (over the other's law and over the other's life-in-the-law), Kötz's calculative goal is to overthrow difference, to coerce it, to manage it with a view to achieving the re-formulation and the re-formation of the local law in terms of what is 'best'. Under Kötz's guardian eye and in the name of 'bestness', disconcerting or distracting singularities will be overlooked, difference will be suppressed in a way that illustrates very well how knowledge-production and repression are not external to each other, how they operate simultaneously, how knowledge-production *is* repression. Violence ('[t]he critic is *forced* to conclude'...) is thus shown to be inherent to the comparative gaze which seeks to instrumentalise and totalise the disruptive mystery of difference, which purports to articulate a power and, through it, an order.

A variation on the time-honoured theme of ethnocentric projection, the formalising method that will further the variance-reducing goals of the comparative project is styled 'functionalism'. Discarding the contents of experiences and values, eliding the concrete law, lacking any critical vocation, betraying a fundamentally technical perspective, and

<sup>118</sup> For a detailed (and critical) re-presentation of the position occupied by this text in the field of comparative legal studies, see Legrand, P (2005) 'Paradoxically, Derrida: For a Comparative Legal Studies' (27) *Cardozo Law Review* 631.

<sup>119</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 362. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 356 ['Der rechtsvergleichende Überblick zeigt also drei verschiedene Systeme, deren jedes an die Abgabe einer Offerte unterschiedliche Rechtswirkungen knüpft. (...) Eine kritische Betrachtung ergibt hier die Überlegenheit des deutschen Systems']. In *An Introduction to Comparative Law* at 8, Kötz argues that 'one of the aims of comparative law is to discover which solution of a problem is the best'. For the original text, see *Einführung in die Rechtsvergleichung* at 8 ['es eines der Ziele rechtsvergleichender Forschung ist, "bessere Lösungen" zu finden']. See also *An Introduction to Comparative Law* at 15, where, in what is presented as a general theoretical introduction to the comparison of laws, Kötz claims that comparatists must aim to find the 'better solution'. For the original text, see *Einführung in die Rechtsvergleichung* at 14 ['bessere Lösung']. Indeed, elsewhere in the *Introduction*, the language used is about solutions being 'better', 'worse', 'equally valid', 'clearly superior', and 'superior to all others': *An Introduction to Comparative Law* at 46-47. For the original text, see *Einführung in die Rechtsvergleichung* at 46 ['besser'; 'schlechter'; 'gleichwertig'; 'die Überlegenheit (...) evident'; 'allen existenten überlegene Lösung']. Given this mindset, it is hardly surprising that Kötz should be promoting a return (!) to 'natural law': *An Introduction to Comparative Law* at 45. For the original text, see *Einführung in die Rechtsvergleichung* at 44 ['Naturrech(t)'].

<sup>120</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 44. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 43 ['Die Lösungen der untersuchten Rechtsordnungen sind von allen systematischen Begriffen dieser Rechtsordnungen zu befreien, aus ihren nur-nationalen dogmatischen Verkrustungen zu lösen und ausschließlich unter dem Aspekt der Funktionalität, der Befriedigung des jeweiligen Rechtsbedürfnisses zu sehen'].

accounting for a view of comparative legal studies as essentially utilitarian, ‘functionalism’ is said to be ‘[t]he basic methodological principle of all comparative law’.<sup>121</sup> Kötz emphasises that ‘[t]he question to which any comparative study is devoted must be posed in purely functional terms’.<sup>122</sup> Lest there be any lingering doubt, it is said again that laws must be seen ‘purely in the light of their function’.<sup>123</sup>

Under the guise of detached inquiry (the book features a call for the ‘pure and disinterested investigation of foreign legal systems’),<sup>124</sup> Kötz practices a coercive cultural politics. In his hands, the law becomes mere material for reprocessing. His motto must be ‘*veni, vidi, vici*’: I came to the diversity of the law, I saw the diversity of the law, I conquered the diversity of the law (ie, I colonised legal pluralism and brought peace to the law).<sup>125</sup> Under the guise of detached inquiry, Kötz also purports to instill conviction in others. In fact, Kötz teaches aspiring comparatists that any conclusion to the effect that there are significant differences across laws should be taken to indicate poor research: comparatists ‘should be warned and go back to check again’.<sup>126</sup> After all, the assumption is that ‘different legal systems give the same or very similar solutions, even as to detail, to the same problems of life’.<sup>127</sup> Just like Unidroit, Kötz wishes ‘to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied’.<sup>128</sup> Here, then, comparativism

<sup>121</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 34. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 33 [‘Das methodische Grundprinzip der gesamten Rechtsvergleichung’].

<sup>122</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 34. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 33 [‘Die Ausgangsfrage jeder rechtsvergleichenden Arbeit muß deshalb rein funktional gestellt (...) werden’].

<sup>123</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 44. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 43 [‘ausschließlich unter dem Aspekt der Funktionalität’].

<sup>124</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 34. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 33 [‘das reine und zunächst zweckfreie Forschen’].

<sup>125</sup> In his book, Kötz explicitly introduces the virtues of comparative legal studies by making reference to the tragedies wrought by war: Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 3.

<sup>126</sup> Id at 40. For the original text, see Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 117 at 39 [‘sollte ihm dies aufmerken lassen und zu einer nochmaligen Prüfung auffordern’]. As for these areas of law where it appears undeniable that ‘[d]ifferent legal systems answer [...] questions quite differently’, well, they should not detain comparatists at all. Rather, they should simply be ‘[left] aside’: id *An Introduction to Comparative Law* supra note 117 at 39-40. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 38 [‘in verschiedenen Rechtsordnungen (werden Fragen) oft sehr verschieden beantwortet’ / ‘außer acht lassen’]. The same contempt for differences across laws informs the thought of those who like to approach differential analysis as a manifestation of ‘chauvinism’. See, eg, Langbein, JH (1997) ‘Cultural Chauvinism in Comparative Law’ (5) *Cardozo Journal of International and Comparative Law* 41. This paper, characterised as much by its acerbic tone as its lack of sophistication, came in reaction to a thoughtful comparative examination arguing for the need to study procedure ‘in deep cultural context’: Chase, OG (1997) ‘Legal Processes and National Culture’ (5) *Cardozo Journal of International and Comparative Law* 1. The quotation is at 17. In the next round, Langbein’s reply is deservedly ignored: Chase, OG (2002) ‘American “Exceptionalism” and Comparative Procedure’ (50) *American Journal of Comparative Law* 277.

<sup>127</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 39. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 38 [‘Verschiedene Rechtsordnungen kommen (...) oft bis in Einzelheiten hinein zu gleichen oder doch verblüffend ähnlichen Lösungen’]. It is easy to observe that this presumption can hardly be reconciled with the goal of ‘better-law’ comparative research, which must assume difference across laws. The comparatist’s ho-hum reaction to such a salient contradiction lying at the heart of what continues to be regarded as the leading text in the field of comparative legal studies nearly forty years after it first appeared says much about the theoretical vacuity still found to be acceptable within comparison-at-law.

<sup>128</sup> Governing Council of Unidroit (2004) ‘Introduction’ in Unidroit *Unidroit Principles of International Commercial Contracts* (2nd ed) International Institute for the Unification of Private Law at xv.



and imperialism rapidly become co-terminous: repression is implemented in favour of an institutionalised doctrine that claims to speak all at once and once for all.

Other comparatists have been even more direct in advocating a logic of enframement. Consider James Gordley's assertion: 'When we describe [judicial] decisions as applications of German or French or American law, we mean little more than that the court making the decision had jurisdiction, because the case arose in these countries. There [is] nothing distinctively German, French or American about the decisions themselves'.<sup>129</sup> For his part, Basil Markesinis goes further still: 'we must try to overcome obstacles of terminology and classification in order to show that foreign law is not very different from ours but only appears to be so'.<sup>130</sup> Elsewhere, Markesinis observes 'how similar our laws on tort are or, more accurately, how similar they can be made to look with the help of some skilful (and well-meaning) manipulation'.<sup>131</sup> Whatever structures would resist the unifying narrative scheme being adumbrated are, it seems, simply to be ignored.

Accepting that these simplifying claims contain limitations that will not be accessible to their own analytical tools, and trying to cast this approach in the most favourable light, one can argue that Kötz, Gordley, and Markesinis, guided by a regulative idea of self-certainty, are truth-seekers and truth-asserters — not, of course, in the sense that they would be seeking or asserting an originary or essential truth in the strictly philosophical way, but as they purport to identify and claim something like truth-in-the-law, that is, truth as it becomes phenomenally explicit as legal knowledge.

(I must emphasise that I am not here claiming to give a comprehensive account of the meaning of the word 'true' as applied to statements made in the — so-called — English language. I am not addressing, for example, the matter of truth as it arises in assertoric statements referring to what are conversationally understood as extralinguistic states of affairs such as 'Paris is in France', 'Death is inevitable', 'Your mother is a liar', 'The photograph of this female foot is 30 cm x 40 cm', or, more problematically, for me, at any rate, 'Spirits live in trees'. And I am certainly not making an ontological claim that there is nothing beyond language, that there is no language-independent 'reality'. Rather than empirically verifiable statements of fact — 'facts' themselves not being unproblematically non-linguistic parts — my concern is with the truth-value of law and with the claim that the presumed truth-value of law can be ascertained and asserted, that is, with the view that a law as expressed in given sentential utterances can properly be identified as right, correct, or best, that it can be said to be the true law as opposed to other laws that would, then, be wrong or incorrect, that is, false. In a nutshell, I want/need to defend the view that the predicate 'true' can no more helpfully be applied to law than 'loud' to a blanket or 'angry' to a cucumber.)

All comparisons that do little more than normalise positivism, or institutionalise law-as-rules-or-precepts, ultimately seek to further the unfinished project of modernity by basing themselves on the concept of 'reason', of correspondence of knowledge to matter, of identity between 'the subject's apprehension of the object' and 'object' as the

---

<sup>129</sup> Gordley, J (1995) 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (43) *American Journal of Comparative Law* 555 at 563.

<sup>130</sup> Markesinis, BS (1993) 'The Destructive and Constructive Role of the Comparative Lawyer' *Rabels Zeitschrift* at 443.

<sup>131</sup> Markesinis, BS (1997) 'Why a Code is Not the Best Way to Advance the Cause of European Legal Unity' (5) *European Review of Private Law* 519 at 520.

condition for the possibility of meaningful intellectual inquiry. Knowledge, understood as the adequation of mind and thing, assumes a surveying or panoptic gaze, and entails a cognitive comportment that seeks to domesticate or manage its 'object'. Thus is orthodox comparative practice seen to bear the discernible stamp of a framework for psychological explanation developed by Descartes, to the effect that a subject takes an independent, objective world to be a certain way and proceeds to re-present that world as being in that way. This Cartesianism may be elusive, and may prove typically invisible to most working comparatists-at-law. But it is there. The apprehension of the subject-object dichotomy as a key feature of the cogniser's epistemic situation is buried away in the commitments, concepts, and explanatory schemes that constitute the deep assumptions of the field.<sup>132</sup>

Rather than promote understanding across legal cultures (or legal traditions), Kötz, Gordley, and Markesinis's administrative rationalities wish to show that the problem of understanding across cultures (or traditions) is a false one because, in effect, there is very little difference across laws. And, to the extent that there is difference, it must be eliminated.<sup>133</sup> The research adduced by these academics and by their epigones — that is, in the end, by most comparatists — indeed implies a specific regime of truth. In order to ascribe meaning to this truth-model, I find it helpful to situate it within Martin Heidegger's philosophical account of truth — which fits within his 'critical deconstruction' of metaphysical concepts.<sup>134</sup>

I argue that the basic epistemological assumption informing orthodox comparative research is truth-as-correctness — what Heidegger calls '*Richtigkeit*' in his *Vom Wesen der Wahrheit*.<sup>135</sup> What is this to say? Let us return to Kötz's statement, '[t]he critic is forced to conclude that on this point [ie, "the issuance of an offer"] the German system is best'. In other words, German law on 'issuance of offer' is better than other laws on 'issuance of offer'. There is right and wrong, and German law is right. German law is correct as opposed to being incorrect, to being false. German law is correct, and Kötz has identified it as being such. In other words, German law is correct, and, operating within the Cartesian re-presentational framework, Kötz has correctly apprehended that it is. The truth as regards 'the issuance of an offer' is German law, which becomes the unique referent to which other forms are subordinated. Here, one has an assertion made by a subject (Kötz) as regards an object ('the German system'). The point for Kötz is to assert a feature of the object (its 'bestness' or, implicitly, its 'correctness' or 'truthfulness') that is an independently determinate property of the object, a fixed attribute, an inherent quality, and to do so in a manner that is adequate to the object itself, that accounts for it exactly such that it can

<sup>132</sup> For what I want/need to regard as a point of pressure on the Cartesian hegemony, see Legrand, P 'Paradoxically, Derrida' supra note 118.

<sup>133</sup> Again, for an examination of this stance and of its implications, see generally Legrand, P 'The Same and the Different' supra note 5.

<sup>134</sup> Heidegger, M (1982) *The Basic Problems of Phenomenology* Hofstadter, A (trans) Indiana University Press at 23 [delivered as a course of lectures in 1927 and published in 1975]. I have modified the translation. For the original text, see id (1975) *Die Grundprobleme der Phänomenologie* in *Gesamtausgabe* vol XXIV Vittorio Klostermann at 31 [*ein kritischer Abbau*]. As I proceed to re-present his views on 'truth', I am acutely aware that Heidegger deliberately moved away from received philosophical language — and, indeed, from ordinary language — because he sought to challenge the commitments embodied in habitual concepts and words, which he found to be unsustainable. Any re-formulation purporting to make Heidegger's thought 'accessible' is therefore fraught with serious difficulties.

<sup>135</sup> Heidegger, M (1977) [1949] 'On the Essence of Truth' in Heidegger, M *Basic Writings* Farrell Krell, D (ed) Sallis, J (trans) Harper Collins at 118.

(and, indeed, must) be said to be 'true'. Ultimately, then, German law is 'true'. Moreover, what Kötz says when he tells us that German law is 'true' is itself 'true'. In this regard, Kötz effectuates the task that he ascribes to comparative legal studies, which he presents as a 'school of truth', an '*école de vérité*' (*en français dans le texte!*): to ascertain truth-in-the-law.<sup>136</sup>

The basic idea at play is at least as old as Thomas Aquinas, who defines truth or '*veritas*' as '*adaequatio rei et intellectus*'.<sup>137</sup> As Heidegger observes in his *Sein und Zeit*, the underlying assumptions are that individuals encounter the world as object and that the structure of the world is isomorphic with that of a statement in subject-predicate form. The aim of thought, then, becomes that of accord, of agreement between subject and object, between knowledge-of-world and world-as-bearer-of-certain-properties, of 'agreement between knowing and the object in the sense of a likening of one entity (the subject) to another (the Object)'.<sup>138</sup> As I will develop below, Heidegger, however, finds it impossible to subscribe to this Cartesian intellectual framework.<sup>139</sup>

First, there is an issue of precedence. Even accepting that a projection of thought into world is possible, it first requires world to have become visible to thought. In other words, manifestation of world must come before any attempt at 'thought-of-world' is feasible. Now, the individual's daily experience of world suggests that world manifests itself to the individual in a tacit, non-reflective way that undergirds any apprehension of world as 'object'. This is because the individual's relation with world is one of involvement arising from the fact that the individual is always-already in the world. Here, the word 'in' cannot refer to the idea of being contained physically in something; otherwise, one would be back to the inadequacies revealed by the subject/object dichotomy (one of which, incidentally, is the distortion of world to the extent that it is constrained by the framework within which thought apprehends it, that it is inevitably reconfigured). Rather, Heidegger means to say that the individual is in the world in the all-encompassing or absorbing sense in which one would say, for instance, that one is 'in' love. Any understanding of the significance of world therefore comes not from cognitive distancing, but from a situation within world allowing the individual to look at things as they actually appear within the nexus of world in which he himself partakes, rather than as synthesised data instantiated by way of a purportedly detached discursive articulation. Secondly, as regards the matter of the word-to-world fit, Heidegger notes that 'it is impossible for *intellectus* and *res* to be equal [in the way "(t)he number '6' agrees with '16 minus 10'"] because they are not of the same species'. Yet, 'knowledge is still supposed to "give" the thing *just as it is*. This "agreement" has the Relational character of the "just as"'.<sup>140</sup>

<sup>136</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 15. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 14 [*'eine "école de vérité"*].

<sup>137</sup> *Summa Theologiae* I, q 16, a 2, ad 2 [c1265]. Kindred formulations are to be found in the earlier work of Abu al-Walid ibn Ruchd, or Averroes (1126-1198), and of Ibn Sina, or Avicenna (980-1037).

<sup>138</sup> Heidegger, M (1962) [1927] *Being and Time* Macquarrie, J and Robinson, E (trans) Blackwell at 261. For the original text, see id (2001) *Sein und Zeit* (18th ed) Max Niemeyer at 218-19 [*'einer Übereinstimmung zwischen Erkennen und Gegenstand im Sinne einer Angleichung eines Seienden (Subjekt) an ein anderes (Objekt)'*]. For the intellectual dynamics between Heidegger and Aquinas on the matter of 'truth', see Caputo, JD (1982) *Heidegger and Aquinas* Fordham University Press at 201-03 and 222-29.

<sup>139</sup> For an excellent account of Heidegger's Cartesian critique, see Richardson, J (1986) *Existential Epistemology* Oxford University Press.

<sup>140</sup> Heidegger, M *Being and Time* supra note 138 at 259 [emphasis original]. For the original text, see id *Sein und*

But let us return to orthodox comparatists-at-law. In identifying its ‘bestness’ or ‘correctness’ or ‘truthfulness’, Kötz, inscribing himself squarely within a Cartesian mindset featuring a subject/object relationship, is ‘giving’ us — or, at least, is purporting to give us — the German system ‘just as’ it is. There is a transcendental dimension to Kötz’s approach. For him, ‘bestness’ of law arises without any reference requiring to be made to local knowledge. ‘German law’ is best, for instance, irrespective of any local situation from which it arises, with which it is connected, or to which it relates. ‘German law’ is best beyond any ‘Germanity’, and this is why it can work for France, England, and elsewhere. The ‘German law’ that Kötz has in view is disembodied, ethereal German law. There is a sense in which it is almost a misnomer to refer to it as ‘German’ law. It is simply a form of law that happens to prevail in Germany (which, incidentally is precisely Gordley’s point). Kötz’s ‘bestness’ thus eschews any local connection. It situates itself in a sphere that is located beyond any local law. It is, in this sense, *transcendental*. There is more. Not only does Kötz aim to locate the comparative project in a beyond-any-law (solutions ‘cut loose from their conceptual context’ and ‘stripped of their national doctrinal overtones’), but he also wants to situate it in a beyond-any-comparatist — which is another feature of his transcendentalisation project. He thus notes that ‘[t]he critic is forced to conclude’ in a particular manner, meaning that any critic, any comparatist, is bound to reach the same conclusion, ie, that the conclusion does not depend on the comparatist, that truth-in-the-law exists irrespective of the comparatist, of what any comparatist may think or say.

Gordley and Markesinis’s arguments also represent a variation on truth-as-correctness, and likewise feature the idea of ‘transcendentality’. Rather than proceed by elimination as Kötz does (ie, address a range of laws and identify the best, thus retaining only one law), they opt for a strategy of aggregation (ie, envisage a range of laws and posit a commonality, thus retaining all laws or, at least, one feature of all laws). As they focus on commonalities, as they axiomatise sameness, as they pursue a totalisation programme, Gordley and Markesinis necessarily leave the plane of immanence (or inherence) to situate themselves transcendently. Just as Kötz fashioned his own ‘bestness’, the concord they claim for laws is a concord they themselves bring into being, a concord they themselves build (indeed, the specification of sameness involves the construction of an elaborate rationalising system implying, for example, the artificial exclusion from the analytical framework of the cultural and traditional dimensions). Now, any such constructed transcendentalisation, as it locates itself beyond-any-law, originates in an ambition to make things straight across space and time, to get things right — indeed to re-present the matter ‘in terms of precise and narrow rules’.<sup>141</sup> Multiplicity is problematic (recall Uncle Theo). Pluralism is not-the-truth; unity or ‘oneness’ is the truth. As long as one remains mired in multiplicity, it can be said that ‘*not enough has yet been done*’.<sup>142</sup> Transcendentalisation is effectuation of ideal, or idealisation

*Zeit* supra note 138 at 216 [‘Gleichheit (ist) auf Grund der fehlenden Gleichartigkeit beider (intellectus und res) unmöglich’ / ‘Die Zahl 6 stimmt überein mit 16-10’ / ‘Erkenntnis soll doch die Sache so “geben”, wie sie ist. Die “Übereinstimmung” hat den Relationscharakter: “So – Wie”’] (emphasis original).

<sup>141</sup> Schlesinger, RB (1968) ‘Introduction’ in *Formation of Contracts: A Study of the Common Core of Legal Systems* vol I Oceana at 9. See also id at 35. Schlesinger’s enterprise, as its designation intimates the idea of a ‘nucleus’ or ‘kernel’ undergirding the surface differentiation of laws, stands for the ‘tellurian’ version of transcendentalisation (cf Bussani, M and Mattei, U [1997-98] ‘The Common Core Approach to European Private Law’ [3] *Columbia Journal of European Law* 339 at 340: ‘common core research is a very promising tool for *unearthing* deeper analogies hidden by formal differences’ [my emphasis]). I am indebted to André Potocki for his material insight.

<sup>142</sup> Adorno observes that differences, whether ‘actual or imagined’, are regarded as ‘stigmas indicating that *not*

(a project that also connects to that of aestheticisation: monistic thought — including, indeed, technical thought — involves a search for beauty in the sense that harmony and equilibrium are valued at the expense of discontinuous asperities).<sup>143</sup> Now, idealisation inevitably relates to truth-as-correctness. Hence, the need for Gordley to extol ‘oneness’ and for Markesinis to tell us, in his inimitable manner, that one must do whatever needs to be done in order to get to ‘oneness’ and that one should not hesitate to ‘manipulat[e]’ data along the way if need there be. After all, if manipulation is used in the service of oneness, correctness, truth, it can only be regarded as ‘well-meaning’ and, therefore, can only be beyond reproach. What could be wrong with doing whatever is necessary to get to the truth?

Along the way, the aspiration to truth is seen to partake in a programme of scientificisation of law generally and of comparative legal studies in particular. Kötz thus asserts the view that ‘an international legal science is possible’ and introduces comparison as ‘a method of legal science’ referring to a ‘universal comparative legal science’.<sup>144</sup> In this regard, Kötz expressly draws an analogy with physics, microbiology, and geology. In the same manner as there is no German physics, no British biology, or no Canadian geology,

---

*enough has yet been done*: Adorno, T (1978) *Minima Moralia* Jephcott, EFN (trans) Verso at 103 [my emphasis]. For the original text, see id (1951) *Minima Moralia* Suhrkamp at 184 [*Sie betrachtet die tatsächlichen oder eingebildeten Differenzen als Schandmale, die bezeugen, daß man es noch nicht weit genug gebracht hat*]. See also, eg, Lyotard, J-F (1983) *Le différend* Editions de Minuit at 215: ‘If there are adversaries, it is because humankind has not achieved its realization’ [*s’il y a des adversaires, c’est que l’humanité n’est pas parvenue à sa réalisation*].

<sup>143</sup> The point is well made by sociologist Georg Simmel. Noting ‘the deep power of attraction in the idea of an harmonic, internally balanced organization of human activity overcoming all resistance of irrational individuality’, he observes that ‘it is the same aesthetic attraction that the machine may exert: the absolute purposiveness and reliability of motions, the extreme reduction of resistance and friction, the harmonic integration of the most minute and the largest parts’: Simmel, G (1968) [1896] ‘Sociological Aesthetics’ in *The Conflict in Modern Culture and Other Essays* Etzkorn, KP (trans) Teachers College Press at 74. For the original text, see id (1992) ‘Soziologische Aesthetik’ in *Gesamtausgabe* vol V Rammstedt, O (ed) Suhrkamp at 206 and 205, respectively [*die tiefe Anziehungskraft, die der Gedanke der harmonischen, innerlich ausgeglichenen, allen Widerstand der irrationalen Individualität überwindenden Organisation des menschlichen Thuns ausübt*] / ‘Es handelt sich hier um den gleichen ästhetischen Reiz wie den, den die Maschine auszuüben vermag (: ) (d)ie absolute Zweckmäßigkeit und Zuverlässigkeit der Bewegungen, die äußerste Verminderung der Widerstände und Reibungen, das harmonische Ineinandergreifen der kleinsten und der größten Bestandtheile’]. See, eg, Simondon, G (1958) *Du mode d’existence des objets techniques* Aubier at 197: ‘there is in technical thought a search for beauty through which the technical object becomes prestigious; the technical object tends to be an *objet d’art*’ [*il y a dans la pensée technique une recherche de la beauté par laquelle l’objet technique devient prestigieux; (...) l’objet technique tend à être objet d’art*]; Blanché, R (1979) *Des catégories esthétiques* Vrin at 53: ‘Beauty is thus in a close relationship with geometry’ [*La beauté est (...) dans une relation étroite avec la géométrie*]. See also Hardy, GH (1948) *A Mathematician’s Apology* Cambridge University Press at 25: ‘The mathematician’s patterns, like the painter’s or the poet’s, must be beautiful; the ideas, like the colours or the words, must fit together in a harmonious way’ [emphasis original]. Indeed, it is said to be ‘rationally justifiable to allow our appraisals of theories to be shaped in part by aesthetic criteria’: McAllister, JW (1996) *Beauty and Revolution in Sciences* Cornell University Press at 204. See generally, eg, Curtin, DW (ed) (1980) *The Aesthetic Dimension of Science* Philosophical Library; Huntley, HE (1970) *The Divine Proportion: A Study in Mathematical Beauty* Dover; Papert, SA (1978) ‘The Mathematical Unconscious’ in Wechsler, J (ed) *On Aesthetics in Science* MIT Press at 105-19; Chandrasekhar, S (1987) *Truth and Beauty* University of Chicago Press; Hovis, RC and Kragh, H (May 1993) ‘P.A.M. Dirac and the Beauty of Physics’ *Scientific American* 62-67; Crease, RP (2003) *The Prism and the Pendulum* Random House; Livio, M (2005) *The Equation That Couldn’t Be Solved: How Mathematical Genius Discovered the Language of Symmetry* Simon and Schuster.

<sup>144</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 45, 33, and 46, respectively [emphasis original]. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 44, 32, and 45 [*die Möglichkeit einer internationalen Rechtswissenschaft (wird) unmittelbar evident*] / ‘Methode der Rechtswissenschaft’ / ‘vergleichender Universalrechtswissenschaft’] (emphasis original).

there will be, ultimately, no French law, no Italian law, and no Dutch law.<sup>145</sup> There will, in other words, be no local law, ie, there will only be a beyond-any-law. The goal is ‘scientific exactitude and objectivity’.<sup>146</sup> Since Kötz is operating within the realm of scientificity, there is no room for local knowledge: ‘the comparatist must eradicate the preconceptions of his native legal system’.<sup>147</sup> Nor, in fact, is there room for interpretation (also something regarded as precariously local or problematic): ‘[reports] should be objective, that is, free from any critical evaluation’.<sup>148</sup>

Before one goes any further, it is important to stress a basic point about orthodox comparativism’s architectonic design. When Kötz, Gordley, and Markesinis decide to build similarities across laws, they very much read with a view to confirming their own preconceptions. Recall Vining: ‘*the comparati[st] presumes similarities between different jurisdictions in the very act of searching for them*’.<sup>149</sup> When Kötz tells us, according to his *Ordnungsschema*, that German law is best, he is in fact saying that German law best meets a regulatory test of bestness that he himself has devised. When Gordley and Markesinis claim that law #1 and law #2 are similar as regards feature A or feature A’, it is because they have identified these features as meeting their own views of what law, any law, should look like. In other words, the transcendentalisation being effectuated is, somewhat ironically (and aporetically), nothing more than an extrapolation from one’s personal outlook; through rhetorical operations that produce the supposed ground of argument, it is Kötz, Gordley, and Markesinis themselves who guarantee the unity of the law to which they aspire. It is, of course, precisely this personal outlook that a comparatist like Kötz, for instance, seeks to marginalise (‘[reports] should be objective’; ‘[t]he critic is forced to conclude’...).

#### IV THE ORTHODOXY APPLIED (RECENTLY AND PROMINENTLY)

We live in an age of *comparisons*.

Nietzsche<sup>150</sup>

You, who are reading me, are you sure to understand my language?

Borges<sup>151</sup>

<sup>145</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 15. Kötz does not address the matter of French literature, German philosophy, or Italian opera — thus making it clear that, in his view, law should emphatically be more ‘like’, say, mathematics than, say, art history.

<sup>146</sup> Id at 45. For the original text, see Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 117 at 44 [‘*wissenschaftliche Exaktheit und Objektivität*’]. Let us charitably overlook the fact that out of the 23 names of authors mentioned in the chapter devoted to method, 22 are German and one is Austrian: Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 32-47.

<sup>147</sup> Id at 35. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 34 [‘*daß man sich in der Rechtsvergleichung von seinen eigenen juristisch-dogmatischen Vorurteilen radikal befreien muß*’].

<sup>148</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 43. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 42 [‘(Es) empfiehlt sich Länderberichte voranzustellen, in denen (...) schlicht, d.h. vor allem ohne kritische Wertung (...) referiert wird’].

<sup>149</sup> Vining, J *The Authoritative and the Authoritarian* supra note 6 [my emphasis].

<sup>150</sup> Nietzsche, F (1926) *Der Wille zur Macht* [I-II] in *Friedrich Nietzsche Gesammelte Werke* [Musarionausgabe] vol XIII Musarion II, § 218 at 161 [‘*wir leben im Zeitalter der Vergleichung*’] (emphasis original).

<sup>151</sup> Borges, JL (1956) [1941] ‘La Biblioteca de Babel’ in *Ficciones* Emecé Editores at 94 [‘*Tú, que me lees, ¿estas seguro de entender mi lenguaje?*’].

In the case of *Lawrence v Texas*, the majority opinion of the US Supreme Court, expressly overturning one of its earlier decisions, appeared to take the view that a Texas statute prohibiting 'deviate sexual intercourse with another individual of the same sex' — in this specific instance, homosexual sodomy — breached constitutional provisions of due process.<sup>152</sup> The cautionary note is in order since the basis of this decision about the regulation of sexual orientation remains unclear. Indeed, it has been said that 'the ambiguity of the prose in the *Lawrence* majority opinion was extraordinary and noteworthy'.<sup>153</sup> Elsewhere, the opinion of the Court (Justice Anthony Kennedy writing for the majority) has been described as 'remarkably opaque',<sup>154</sup> if only because '[t]he conventional doctrinal categories and terms are simply missing'.<sup>155</sup> References have also been made to the fact that the opinion is 'very unclear', to its 'fundamental confusion', to its 'vacuous' character, and to the way in which it features 'evasions through circularity'.<sup>156</sup> It has been suggested that the Court's problematic formulations may have to do with the 'discomfort' felt by the Justices as they find themselves confronted with the subject of sex: 'The Justices may be doing what comes naturally to them, what well-brought-up people do when they are somewhat uncomfortable or uncertain — they turn awkwardly away and get caught up in circumlocutions'.<sup>157</sup> Indeed, it is said that '[i]ndirection when the subject is sex is not new to the Court' and that '[t]his difficulty has been particularly acute for sodomitical and homosexual acts'.<sup>158</sup> Writing on *Lawrence*, one of the Court's best-known commentators thus refers to 'the 'fundamental right' that dare not speak its name'.<sup>159</sup> More generously, it has also been argued that the Court's decision was written 'in a complex, strategic fashion' — although the author of this compliment remains unclear to what extent this 'strategically powerful complex' was 'deploy[ed] [...] knowingly or not'.<sup>160</sup> He observes, in any event, that the opinion, which he deplores as a 'cacophony',<sup>161</sup> has 'a slightly schizoid quality'.<sup>162</sup> As a result of the Court's imprecision, interpreters have been perplexed: 'What, exactly, is the basis of the holding?'<sup>163</sup>

Although the majority opinion was 'powerfully influenced by a claim of equality',<sup>164</sup> *Lawrence* is clearly not an 'equal protection' decision — this, however, being the gist of Justice

<sup>152</sup> *Lawrence v Texas* 539 US 558 (2003) [*Lawrence*]. For arguments to the effect that *Lawrence* remains governed by heteronormative impulses and that the 'emancipatory horizon' emerging from the decision is not nearly as open in terms of sexual politics as may have been thought, see Franke, KM (2004) 'The Domesticated Liberty of *Lawrence v. Texas*' (104) *Columbia Law Review* 1399 at 1400. See also Ruskola, T (2005) 'Gay Rights versus Queer Theory: What Is Left of Sodomy after *Lawrence v. Texas*?' (23) *Social Text* 235; Note (2005) 'Unfixing *Lawrence*' (118) *Harvard Law Review* 2858; Hunter, ND (2004) 'Sexual Orientation and the Paradox of Heightened Scrutiny' (102) *Michigan Law Review* 1528.

<sup>153</sup> Case, MA (2003) 'Of "This" and "That" in *Lawrence v Texas*' *Supreme Court Review* 75 at 75, note 2.

<sup>154</sup> Sunstein, CR (2003) 'What Did *Lawrence* Hold?' *Supreme Court Review* 27 at 29.

<sup>155</sup> *Id* at 46.

<sup>156</sup> Mohr, RD (2004) 'The Shag-A-Delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in *Lawrence v. Texas*' (10) *Cardozo Woman's Law Journal* 365 at 366, 367, 371, and 371, respectively.

<sup>157</sup> Case, MA 'Of "This" and "That" in *Lawrence v Texas*' *supra* note 153 at 77.

<sup>158</sup> *Id* at 77, note 10 and at 77, note 7, respectively.

<sup>159</sup> Tribe, LH (2004) '*Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name' (117) *Harvard Law Review* 1894.

<sup>160</sup> Note, 'Unfixing *Lawrence*' *supra* note 152 at 2863, 2868, and 2868.

<sup>161</sup> *Id* at 2870.

<sup>162</sup> *Id* at 2866.

<sup>163</sup> Case, MA 'Of "This" and "That" in *Lawrence v Texas*' *supra* note 153 at 118.

<sup>164</sup> Sunstein, CR 'What Did *Lawrence* Hold?' *supra* note 154 at 53.

Sandra O'Connor's concurrence.<sup>165</sup> Rather, *Lawrence* is a rare application of substantive due process. It has been remarked that '[s]ince 1985, the Court has been extremely reluctant to use the idea of substantive due process to strike down legislation'.<sup>166</sup> Its revival in *Lawrence* is regarded as 'dramati[c] and unexpect[ed]'.<sup>167</sup> Despite the suggestion voiced by Justice Antonin Scalia in his dissenting opinion,<sup>168</sup> it is unclear that *Lawrence* was based on rational-basis review: 'the Court did not say that the Texas statute lacked a "rational basis"' and 'it did not use the 'rational basis' formulation at any point in its analysis'.<sup>169</sup> Accordingly, '*Lawrence* is not plausibly a rational basis decision' (bearing in mind that the rational-basis test will only rarely lead to the invalidation of a state law).<sup>170</sup> But then it is unclear that a 'fundamental right' was at issue, for 'the Court did not unambiguously identify any 'fundamental interest' on the part of the plaintiffs that would support its ruling' and 'did not use the "fundamental interest" formulation at any point in its analysis'.<sup>171</sup> Indeed, while precedent requires the fundamental right being asserted to be 'objectively, "deeply rooted in this Nation's [ie, the US's] history and tradition"',<sup>172</sup> Justice Kennedy prudently pointed to 'an emerging awareness' of a right to sexual autonomy noting the fact that 'our laws and traditions in the past half century are of most relevance here'.<sup>173</sup> Indeed, an appellate court has since taken the view that *Lawrence* did not involve any fundamental right.<sup>174</sup>

But the cryptic nature of the Court's opinion has not deterred a number of commentators from interpreting *Lawrence* as a fundamental-rights decision. Unsurprisingly, though, there is no consensus with respect to the specification of the fundamental right that the Court is said to have undertaken to protect via substantive due process. For Cass Sunstein, the right concerns 'homosexual sex between consenting adults'.<sup>175</sup> For Laurence Tribe, the case is about 'the right to dignity and equal respect for people involved in intimate relationships, whether or not they choose to keep those relationships closeted', 'not the *set of specific acts* that have been found to merit constitutional protection, but rather the *relationships* and *self-governing commitments* out of which those acts arise'.<sup>176</sup> For others, what is at stake is an 'agency righ[t] to make decisions about which avenues of sexual expression to pursue, at least in private between two adults not married to someone else' or 'a right [...] of adults

<sup>165</sup> *Lawrence* at 579-85.

<sup>166</sup> Sunstein, CR 'What Did Lawrence Hold?' supra note 154 at 38.

<sup>167</sup> Carpenter, D (2004) 'Is *Lawrence* Libertarian?' (88) *Minnesota Law Review* 1140 at 1148.

<sup>168</sup> *Lawrence* at 594. Justice Scalia is relying on a passage in the majority opinion where reference is made to the fact that '[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual': id at 578.

<sup>169</sup> Sunstein, CR 'What Did Lawrence Hold?' supra note 154 at 46.

<sup>170</sup> Id at 47.

<sup>171</sup> Ibid.

<sup>172</sup> *Washington v Glucksberg* 521 US 702 (1997) at 720-21 (Rehnquist CJ for the Court) [holding that there is no fundamental right to assistance in committing suicide and referring to *Moore v City of East Cleveland* 431 US 494 (1977) at 503, Powell J].

<sup>173</sup> *Lawrence* at 571-72 and 572, respectively.

<sup>174</sup> *Lofton v Secretary of the Department of Children and Family Services* 358 F3d 804 (11th Cir 2004). In *State v Limon* 83 P3d 229 (Kan Ct App 2004), where *Lawrence* was held to be factually and legally distinguishable, there is no suggestion either that *Lawrence* heralded the recognition of a fundamental right by the US Supreme Court. For an interesting argument explaining how *Lawrence* could have helped the person charged with homosexual activity pursuant to a Kansas statute in *Limon*, see Koppelman, A (2004) '*Lawrence's* Penumbra' (88) *Minnesota Law Review* 1171.

<sup>175</sup> Sunstein, CR 'What Did Lawrence Hold?' supra note 154 at 48.

<sup>176</sup> Tribe, LH '*Lawrence v. Texas*' supra note 159 at 1945 and 1955, respectively [emphasis original].



to engage in a noncommercial, consensual, sexual relationship in private, where their activity involves no injury to a person or harm to an institution (like marriage) the law protects'.<sup>177</sup> It is therefore a state interference with this right thus (variously) formulated that would call for strict scrutiny on the part of the judiciary (as distinguished from the lower level of scrutiny associated with rational-basis review). That is, unless another line of analysis obtains to the effect that the Court is adopting a new substantive due process methodology whereby state infringement of an individual right is assessed irrespective of the 'fundamental' character of that right.<sup>178</sup> Calling Justice Kennedy's opinion 'strikingly innovative' and, indeed, 'extravagant', Robert Post defends this position.<sup>179</sup> In his view, *Lawrence* 'breaks' with the received approaches to substantive due process and 'signal[s] that the Court is concerned with constitutional values that have not heretofore found their natural home in the Due Process Clause'.<sup>180</sup>

Quite apart from the issues involved as regards the rights of sexual minorities, the opinion of the Court provoked intense controversy to the extent that it appeared to want to derive 'normative purchase' from foreign law. Generating an extraordinary torrent of editorials, articles, and heated classroom and internet discussion, the Court referred to the European Court of Human Rights's decision in *Dudgeon v United Kingdom*: 'the reasoning and holding in *Bowers* [the earlier judgment that the US Supreme Court proceeded to overturn] have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, ¶ 56 (Eur. Ct. H.R., Sept.25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988)'.<sup>181</sup> In a vigorous dissent, Justice Scalia argued that not only was the reference to foreign judicial decisions such as *Dudgeon* 'meaningless dicta' but (somewhat contradictorily) that it was '[d]angerous dicta' also.<sup>182</sup>

Interestingly, it is said that '*Lawrence* represents the first time the Supreme Court has cited foreign case law in the process of overruling an American constitutional precedent'.<sup>183</sup>

<sup>177</sup> Hunter, ND (2004) 'Living with *Lawrence*' (88) *Minnesota Law Review* 1103 at 1113; Carpenter, D 'Is *Lawrence* Libertarian?' supra note 167 at 1153.

<sup>178</sup> Barnett, RE (2004) *Restoring the Lost Constitution* Princeton University Press at 35-36.

<sup>179</sup> Post, RC (2003) 'Fashioning the Legal Constitution: Culture, Courts, and the Law' (117) *Harvard Law Review* 4 at 96.

<sup>180</sup> Id at 97 and 97-98, respectively.

<sup>181</sup> *Lawrence* at 576 (Kennedy J, for the Court). The reference to the European Court of Human Rights's leading decision is *Dudgeon v United Kingdom*, [1981] ECHR 5. A measure (although, clearly, not the most interesting measure) of the ensuing furore has to do with the fact that on 13 May 2004 the Constitution Sub-committee in the US House of Representatives adopted a resolution '[t]hat it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States': HR Resolution 568, 108th Congress, 2nd Session (2004).

<sup>182</sup> *Lawrence* at 598 (Scalia J, dissenting).

<sup>183</sup> Eskridge, WN (2004) '*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism' (2) *International Journal of Constitutional Law* 555 at 555. It has also been observed that '[f]or the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution': Alford, RP (2004) 'Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on *Lawrence v. Texas*' (44) *Virginia Journal of International Law* 913 at 915. *Adde*: 'Justice Kennedy's opinion in *Lawrence*, for the first time in a Supreme Court majority opinion, cited with approval an authority from European law': Sullivan, KM and Gunther, G (2004) *Constitutional Law* (15th ed) Foundation

Speaking extra-judicially, Justice O'Connor has suggested that, although the US Supreme Court has occasionally referred to foreign materials before,<sup>184</sup> a decision like *Lawrence* indicates a new approach to adjudication (it points to 'the first indicia of change', in her words): 'conclusions reached by other countries [...], although not formally binding upon our decisions, should at times constitute persuasive authority in American courts'. Justice O'Connor, referring to *Lawrence*, in which, let us recall, she wrote a concurring opinion, said that '[i]n ruling that consensual homosexual activity in one's home is constitutionally protected, the Supreme Court *relied* in part on a series of decisions from the European Court of Human Rights'.<sup>185</sup> Along converging lines, Justice Ruth Ginsburg has expressed the opinion that 'comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights'.<sup>186</sup> But it is perhaps Justice Stephen Breyer's views that have been most widely aired. In an address to the American Society of International Law on 4 April 2003, Justice Breyer boldly referred to 'the global legal enterprise that is now upon us'.<sup>187</sup> For Justice Breyer, '[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances'.<sup>188</sup> Consequently, according to Justice Breyer, there are to be found 'cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas'.<sup>189</sup> In his view, these 'growing institutional and substantive similarities [...] reflect [...] a near-universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity'.<sup>190</sup> To be sure, Justice Breyer acknowledges that 'there may be relevant political and structural differences between [other nations'] systems and our own [ie, the United States]'.<sup>191</sup> But '[other nations'] experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem'.<sup>192</sup>

I do not propose to discuss whether or not the reference by the US Supreme Court to foreign judicial decisions in *Lawrence* conforms to current US constitutional hermeneutics, nor whether there exists, as a matter of US constitutional law, an entitlement to normative

---

Press at 613.

<sup>184</sup> For a review of the case law, see Calabresi, SG and Zimdahl, SD (2005) 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision' (47) *William & Mary Law Review* 743.

<sup>185</sup> O'Connor, SD (28 October 2003) 'Remarks to the Southern Center for International Studies', Atlanta, at [www.humanrightsfirst.org/us\\_law/inthe\\_courts/Southern\\_Center\\_International\\_Studies\\_Justice\\_O%27Connor.pdf](http://www.humanrightsfirst.org/us_law/inthe_courts/Southern_Center_International_Studies_Justice_O%27Connor.pdf) [last visited on 18 January 2006] (my emphasis). For the expression of a favourable view regarding the relevance of foreign law with specific reference to Eighth-Amendment jurisprudence, see Justice O'Connor's concurring opinion in *Roper v Simmons*, 543 US 551 (2005) at 604-05.

<sup>186</sup> Ginsburg, RB and Merritt, DJ (1999) 'Affirmative Action: An International Human Rights Dialogue' (21) *Cardozo Law Review* 253 at 282 [underlining original].

<sup>187</sup> Breyer, S (2003) 'Keynote Address' (97) *American Society of International Law Proceedings* 265 at 268.

<sup>188</sup> *Id* at 266.

<sup>189</sup> *Id* at 267.

<sup>190</sup> *Ibid*.

<sup>191</sup> *Id* at 266.

<sup>192</sup> *Ibid*. Here, as in the preceding note, Justice Breyer is in fact quoting from his own opinion in *Printz v United States*, 521 US 898 (1997) at 977 (Breyer J, dissenting). Curiously, perhaps, given the prominent status that Justice Breyer has acquired as a defender of these views (see, eg, his public debate with Justice Scalia on the constitutional relevance of foreign court decisions organised at the American University, Washington, DC, on 13 January 2005 under the auspices of the US Association of Constitutional Law and televised live on C-Span), the topic is absent from his recent book: Breyer, S (2005) *Active Liberty* Knopf.

cognisability independently from any embodiment in US constitutional law that would signify an expansion of the constitutional canon of materials from which (largely because of a doctrine of local accountability pertaining to institutional legitimacy) the judiciary has been known to draw in addressing constitutional guarantees.<sup>193</sup> I am interested in the US Supreme Court's *comparative* practice.<sup>194</sup> How, then, does the US Supreme Court fare as *comparatist-at-law* in *Lawrence*? Even bearing in mind that one is dealing with a modest comparative intervention (ie, comparative analysis in the form of a bare reference to foreign materials) and even allowing the US Supreme Court's commitment to transnational communication as embodying the best features of the great tradition of humanistic learning and education,<sup>195</sup> the answer I want to defend is: 'Not at all well'. What we have here is something like '*erudicion á vapor*'.<sup>196</sup>

<sup>193</sup> For an argument urging restraint, see Childress, DE (2003) 'Using Comparative Constitutional Law to Resolve Domestic Federal Questions' (53) *Duke Law Journal* 193. For a view calling for recourse to foreign law, see Glensy, R (2004) 'Which Countries Count?: *Lawrence v. Texas* and the Selection of Foreign Persuasive Authority' (45) *Virginia Journal of International Law* 357. For a claim suggesting that reference to foreign law should be allowed in certain cases but not in *Lawrence*, see Calabresi, SG and Zimdahl, SD 'The Supreme Court and Foreign Sources of Law' supra note 184. For a plea in favour of resorting to the law of 'Western-style democracies', see Glensy, R supra at 430. For a stance rejecting this 'Eurocentric' approach, see Fontana, D (2001) 'Refined Comparativism in International Law' (49) *UCLA Law Review* 539 at 573.

<sup>194</sup> I am not, however, preoccupied with the recourse to foreign decisions when these are used to assist US judges in shedding light on common international texts such as the Vienna Convention on the International Sale of Goods (CISG) or the Warsaw Convention — which are arguably not 'external' law as such. Even in terms of the comparative sphere, I ignore what has been called 'historical matrix comparativism' or 'genealogical comparativism'. The first formulation is in Alford, RP (2004) 'Misusing International Sources to Interpret the Constitution' (98) *American Journal of International Law* 57 at 58, note 10. It refers to the use of foreign materials 'to understand the context of our Constitution's text, structure, and history'. A good illustration is offered in *Rasul v Bush*, US Reports Slip Opinion vol 03-334 (2004), 542 US \_\_\_ (2004), rendered on 28 June 2004, the 'Guantánamo' decision, where Justice John Paul Stevens, writing for the majority, refers to ancient English law in order to delineate the contours of the writ of *habeas corpus* as it partakes in remedies recognised by US constitutional law. The other expression is in Fontana, D 'Refined Comparativism in International Law' supra note 193 at 550-51.

<sup>195</sup> Professor Karen Knop observes that the Justices' motivation may be less honourable than it seems. Specifically, Professor Knop mentions an interview with Justice Kennedy, which I traced to *The New Yorker*, where he made the following point: 'If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us'. The journalist cast this brand of 'American evangelism' as 'a corollary to President Bush's policy of exporting freedom'. For these statements, see Toobin, J (12 September 2005) 'Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court' *The New Yorker* at 50. In her 'Remarks to the Southern Center for International Studies' supra note 185, Justice O'Connor was even more emphatically imperialistic: 'When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced'. Justice Breyer's view, as expressed in his public debate with Justice Scalia, can also be regarded as problematic as it conveys the 'good colonizer's' condescension: 'in some of these countries there are institutions, courts that are trying to make their way in societies that didn't used [sic] to be democratic [...]. [W]hy don't we cite them occasionally? They will then go to some of their legislators and others and say, "See, the Supreme Court of the United States cites us." That might give them a leg up, even if we just say it's an interesting example'. The transcript of the debate produced by the Federal News Service is available on various web sites, such as [www.freerepublic.com/focus/f-news/1352357/posts](http://www.freerepublic.com/focus/f-news/1352357/posts) [last visited on 18 January 2006]. To what extent do these expressions of views — all of them extra-judicial — vindicate Duncan Kennedy's claim that US judges act in 'bad faith'? For this argument, see Kennedy, D (1997) *A Critique of Adjudication* Harvard University Press passim.

<sup>196</sup> The phrase is in Alberdi [Juan Bautista] (1868) *El Proyecto de Código civil para la República Argentina* Jouby & Roger at 5, where the author objects to the snippety compilation of De Saint-Joseph, A (1856) *Concordance entre les codes civils étrangers et le Code Napoléon* (2nd ed) 4 vol Cotillon: 'he has created instant erudition, mechanical erudition, so to speak, with which history is made almost as easily as music is played on a barrel-organ' [*ha creado la erudicion á vapor, la erudicion mecánica por decirlo así, con que se hace historia casi con la facilidad con que se toca música en un órgano de Berberie*].

Before I continue, however, I must emphasise that I come to my critique of the US Supreme Court's comparative intervention with considerable diffidence. My conversations with colleagues and friends in the US and my own teaching experience in a US law school have sensitised me to the political climate within which the decision to resort to foreign law was made by the majority of the Court in *Lawrence*. Working against the view that distance in space is distance in time, the Court's move came at a juncture when the idea of US exceptionalism — manifesting itself in an array of attitudes ranging from protectionism to imperialism — had gained especially strong political currency within the US (against a background, moreover, where there has always been far more interest in exporting law than in borrowing it).<sup>197</sup> Those who regard any claim along the lines of 'exceptionalism' as partaking in ethnocentric propaganda no doubt experienced the reference to European Court of Human Rights decisions in *Lawrence* and the move away from a seemingly unrelenting discussion of the origins of the US Constitution, the intent of the Framers, and the uniqueness of US constitutional experience, as a courageous anti-hegemonic stance on the part of various Justices sitting on the US Supreme Court — which I am still prepared to accept it possibly is, given the context within which it materialised (although I remain troubled by the way in which these moves are being co-opted in support of simplistic arguments defending a judicial cosmopolitanism that has suddenly become doctrinally chic).<sup>198</sup> This is especially the case if one bears in mind that this decision involved the rights of sexual minorities, a subject highly controversial across US society, not least on account of the way it connects with the empirically ascertainable predilection shown by US citizens for religiosity. Let me insist that I can very well see how it cannot be 'easy' for a US Supreme Court Justice to incorporate references to foreign law at this specific historical moment and in this disputed socio-legal environment. There is more, for the foreign references are called in aid (in one form or another, at one level or another) to invalidate a state law in a context of longstanding judicial deference for statutes — such deference continuing to be immensely valued by a substantial segment of the legal community and an important sector of the US population, which, for example, would be critical of the Supreme Court's review of executive or police action.<sup>199</sup> In addition, there are Supreme Court Justices who argue forcefully in favour of the idea that the judicial interpretation of the Constitution must not allow for current social values, since to do so would ultimately undermine the democratic will of those who ratified the constitutional text and would allow (undemocratic) judges to substitute their own predilections. Known as 'originalism', this philosophy of constitutional interpretation is tirelessly promoted by Justice Scalia, not least extra-judicially.<sup>200</sup> Within this framework, where deference to text

<sup>197</sup> See generally Koh, HH (2003) 'On American Exceptionalism' (55) *Stanford Law Review* 1479; Ignatieff, M (ed) (2005) *American Exceptionalism and Human Rights* Princeton University Press; Shafer, BE (ed) *Is America Different?* Oxford University Press; Lipset, SM (1996) *American Exceptionalism* Norton; Lockhart, C (2003) *The Roots of American Exceptionalism* Macmillan; Madsen, DL (1998) *American Exceptionalism* University Press of Mississippi.

<sup>198</sup> Examples of this 'vanilla' comparative scholarship include Slaughter, A-M (2003) 'A Global Community of Courts' (44) *Harvard Journal of International Law* 191; id (2004) *A New World Order* Princeton University Press at 65-103; Harding, SK (2003) 'Comparative Reasoning and Judicial Review' (28) *Yale Journal of International Law* 409.

<sup>199</sup> Imbricated within this deference for legislative enactments is the fact that 'the bulk of American law is still state law, and overwhelmingly so': *US v Morrison*, 529 US 598 (2000) at 661 (Breyer J, dissenting).

<sup>200</sup> See Scalia, A (1997) *A Matter of Interpretation: Federal Courts and the Law* Gutmann, A (ed) Princeton University

and understanding of text is paramount, there can be little room for foreign input. Justices who show themselves prepared to derive help from foreign sources must therefore also confront the arguments advocated by the defenders of originalism — whose influence on the Court's constitutional jurisprudence has proved significant.<sup>201</sup> There is at least one other observation that can be made regarding the obstacles faced by Supreme Court Justices favouring some form of foreign input in *Lawrence*. In order to prohibit the state regulation at issue, the Court may have relied on an interpretation of the Due Process Clause allowing for substantive due process. But this doctrine is controverted. According to Justice Scalia, for example, the idea of substantive due process represents an unjustifiable 'springboard[d] for judicial lawmaking'.<sup>202</sup>

*Lawrence* — no matter how it finds itself being judicially interpreted in future<sup>203</sup> — also marks a significant gain for sexual minorities in the US. On account of *Lawrence*, homosexuals stand 'entitled to respect for their private lives'.<sup>204</sup> They are no longer apprehended as potential criminals — as they had been since the US Supreme Court decision in *Bowers v Hardwick* read a Georgia statute that criminalised certain form of gender-neutral sexual behaviour as being specifically aimed at 'homosexual sodomy' and allowed the legislative text to withstand constitutional challenge on the disingenuous ground that there is no 'fundamental right to engage in homosexual sodomy'.<sup>205</sup> Recognising the framing of the question in *Bowers* as spurious, *Lawrence* states emphatically that *Bowers* 'demeans the lives of homosexual persons'.<sup>206</sup> Beyond this scathing repudiation of a precedent less than twenty years old, *Lawrence* refuses to reduce homosexuality to a specific sexual practice (ie, sodomy) and expressly acknowledges identitarian claims on the part of homosexual individuals by observing that homosexuality is 'a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals' and by adding that 'adults may choose to enter upon this

Press at 3-48 and 129-49.

<sup>201</sup> For a review of this assessment, see, eg, Kramer, LD (2001) 'The Supreme Court 2000 Term Foreword: We the Court' (115) *Harvard Law Review* 4 at 14. See generally Goldford, DJ (2005) *The American Constitution and the Debate Over Originalism* Cambridge University Press; O'Neil, J (2005) *Originalism in American Law and Politics* Johns Hopkins University Press.

<sup>202</sup> Scalia, A *A Matter of Interpretation* supra note 200 at 25.

<sup>203</sup> 'Restrictive' readings are exemplified in *Lofton v Secretary of the Department of Children and Family Services* supra note 174, and *State v Limon* supra note 174. An 'expansive' interpretation is offered in *Goodridge v Department of Public Health*, 798 NE 2d 941 (Mass 2003), where the Supreme Judicial Court of Massachusetts held that a marriage licensing statute excluding otherwise qualified same-sex applicants was unconstitutional. While the Court acknowledged that *Lawrence* had left this specific question open (indeed, *Lawrence* says that '[i]t does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter': at 578, Kennedy J, for the Court), it featured the Supreme Court's decision prominently. See, eg, at 948, 953, and 959, for the opinion of the Court, and at 973, for the concurring opinion. As regards the US Supreme Court's own reaction to *Lawrence*, Post suggests that 'the Court [will] calibrate its future decisions to the strength and quality of the public response to its opinion': Post, RC 'Fashioning the Legal Constitution' supra note 179 at 101. *Lawrence*, according to him, creates 'genuine uncertainty': at 105. The difficulty is compounded, of course, by the fact that there is no monolithic cultural ethos 'out there' and that 'public opinion' is very much in the nature of a composite. This is a good illustration of the way in which 'presuppositions about the harmonious and integrated coherence of culture seem not to weather close scrutiny': Amsterdam, AG and Bruner, J (2000) *Minding the Law* Harvard University Press at 230-31.

<sup>204</sup> *Lawrence* at 578 (Kennedy J, for the Court).

<sup>205</sup> *Bowers v Hardwick*, 478 US 186 (1986) at 190 and 191, respectively (Powell J, for the Court). For a sophisticated critique of *Bowers*, see Halley, JE (1993) 'Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*' (79) *Virginia Law Review* 1721.

<sup>206</sup> *Lawrence* at 575 (Kennedy J, for the Court).

relationship in the confines of their homes and their own private lives and still retain their dignity as free persons'.<sup>207</sup> With *Lawrence*, the US Supreme Court provides a stigmatised constituency with a forum where to object to discrimination and assert constitutional rights.<sup>208</sup>

Even though it is accepted that rights are something sexual minorities cannot not want,<sup>209</sup> and even though *Lawrence* must therefore be saluted as a major step in the 'rights' direction, a critique of *Lawrence* remains possible, even necessary. Thus, staunch and sophisticated advocates of sexual minorities' rights chastise *Lawrence* on account of the fact that the decision may be taken to have generated 'a path dependency that privileges privatised and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality'.<sup>210</sup> In other words, even writers militating actively and eloquently in favour of sexual minorities' rights and recognising the salient contribution that *Lawrence* makes to that cause, have felt able, indeed, duty-bound, to observe that '[it] forecloses important avenues for political engagement'.<sup>211</sup>

In that same vein, it can be maintained that although foreign decisions are something comparatists cannot not want in a US Supreme Court opinion, a critique of *Lawrence* remains possible, even necessary. Granting an immunity from critique to the US Supreme Court on account of its xenophilia or xenotropism would be infantilising it. For example, one must be allowed to ask whether institutional recognition of foreign law in the specific manner it took place in *Lawrence* does not come at a price, such as the promotion of an uncreditable approach to comparison-at-law and the simultaneous marginalisation of other, weightier brands of comparativism which, on account of the higher standards they set, are rendered less visible. Is the comparatist in fact not duty-bound to raise his voice, so as to avoid a normalising process whereby the US Supreme Court would be said to be addressing the 'cosmopolitan' agenda and to be engaging in comparative analysis the moment it sprinkles its decisions with the most cursory references to foreign law? I argue that a critique of the Court's brand of comparativism in *Lawrence* — labelled 'crude' by Laurence Tribe,<sup>212</sup> himself the lawyer of record on behalf of the homosexual petitioner in *Bowers v Hardwick* — is legitimate; that it is required; that it can take place in full awareness of the hurdles that the 'foreign-minded' wing of the Court faced as it elected to mention European decisions; and that it can happen without disabling or having a corroding effect

<sup>207</sup> Id at 567 (Kennedy J, for the Court).

<sup>208</sup> For a comprehensive argument on the emergence of 'identity-based social movements' seeking constitutional recognition of their specificity, see Eskridge, WN (2001) 'Channeling: Identity-Based Social Movements and Public Law' (150) *University of Pennsylvania Law Review* 419. See also Reed, DS (1999) 'Popular Constitutionalism: Toward a Theory of State Constitutional Meanings' (30) *Rutgers Law Journal* 871 [showing how the generation of state constitutional meanings is developed and sustained by the political engagement of interest groups with specific reference to the law regulating sexual orientation].

<sup>209</sup> Ruskola, T 'Gay Rights versus Queer Theory' supra note 152 at 244, referring to Spivak, GC (1993) *Outside in the Teaching Machine* Routledge at 46. Franke, KM also uses this reference: 'The Domesticated Liberty of *Lawrence v. Texas*' supra note 152 at 1413. For an insightful discussion, see Brown, W (2002) 'Suffering the Paradoxes of Rights' in Brown, W and Halley, J (eds) *Left Legalism/Left Critique* Duke University Press 420.

<sup>210</sup> Franke, KM 'The Domesticated Liberty of *Lawrence v. Texas*' supra note 152 at 1414.

<sup>211</sup> Ruskola, T 'Gay Rights versus Queer Theory' supra note 152 at 242.

<sup>212</sup> Tribe, LH '*Lawrence v. Texas*' supra note 159 at 1931. In the same way as the deficient use of history in US constitutional discourse can be captured by the notion of 'history lite' (Flaherty, MS [1995] 'History "Lite" in Modern American Constitutionalism' [95] *Columbia Law Review* 523), one could resort to the idea of 'comparison lite' to point to the inadequacies of comparative analysis in US constitutional discourse.

on the Court's 'foreign initiative'. To claim that the US Supreme Court failed to do good comparative work in *Lawrence* cannot be equated to joining sides with Justice Scalia, whose disposedness towards foreign law is such that he would have had no reference to it at all.<sup>213</sup> As far as I can tell, Justice Scalia stands for something like the *degré zéro* of comparativism and possibly for outright anti-comparativism. Again (and no doubt allowing for some exaggeration on my part), Justice Scalia acts as if there was nowhere else and no one else on the planet that the US Supreme Court could legitimately deem worthy of interest or reflection and, a fortiori, that could provide it with worthwhile inspiration. From a comparative standpoint, Justice Scalia's views connote closure (to the foreign) and erasure (of the foreign). They stand for something along the lines of judicial autarky. Indeed, he himself makes his point emphatically clear: 'It is my view that foreign legal materials can never be relevant to an interpretation of — to the meaning of — the US Constitution'.<sup>214</sup> No comparatist-at-law can subscribe to an agenda that 'offers us [...] the kind of self-satisfied strutting that gives chauvinism a bad name' and that leads, in the end, to a world of colliding soliloquy.<sup>215</sup> A fascinating parallel can in fact be drawn between Justice Scalia's treatment of foreign law in *Lawrence* and his treatment of homosexual individuals in that same case. In his dissent, Justice Scalia makes it clear that the Texas statute criminalising sexual practices such as sodomy should not be held unconstitutional. He rebuffs the Court for 'ha[ving] largely signed on to the so-called homosexual agenda' and for causing 'a massive disruption of the current social order'.<sup>216</sup> In the process, Justice Scalia is assertively denying recognition to sexual otherness. The sexual other, the one who is sexually different, the homosexual for instance, ought not to be acknowledged by the US Supreme Court. Indeed, the Court should sanction the repression of sexual otherness by allowing the criminalisation of certain sexual conduct. As one reads Justice Scalia inveighing against the Court, one is prompted to observe that his denial or erasure of otherness in matters sexual matches his denial or erasure of otherness in matters adjudicative. The sexual other has

<sup>213</sup> Eg: *Thompson v Oklahoma*, 487 US 815 (1987) at 868, note 4 (Scalia J, dissenting); *Stanford v Kentucky*, 492 US 361 (1988) at 369, note 1 (Scalia J, for the Court); *Printz v US* supra note 192 at 921, note 11 (Scalia J, for the Court); *Atkins v Virginia*, 536 US 304 (2002) at 347-48 (Scalia J, dissenting); *Roper v Simmons* supra note 185 at 18-23 (slip opinion). See also Scalia, A (2004) 'Foreign Authority in the Federal Courts' (98) *American Society of International Law Proceedings* 305.

<sup>214</sup> Scalia, A 'Foreign Authority in the Federal Courts' supra note 213 at 307 [emphasis original]. Observe that, although the invocation of comparative materials has been shown to tally with political preferences (Epstein, L and Knight, J [2003] 'Constitutional Borrowing and Nonborrowing' [1] *International Journal of Constitutional Law* 196 at 206-09), the reluctance to refer to foreign data can cut across 'conservative'/'liberal' lines. For an illustration of 'liberal' reticence, see Ackerman, B (1991) *We the People* vol I: *Foundations* Harvard University Press at 3: 'America is a world power, but does it have the strength to understand itself? Is it content, even now, to remain an intellectual colony, borrowing European categories to decode the meaning of its national identity? [...] To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern of constitutional thought and practice'. See also *id* at 3-4: 'The Constitution presupposes a citizenry with a sound grasp of the distinctive ideals that inspire its political practice. As we lose sight of these ideals, the organizing patterns of our political life unravel. If "sophisticated" constitutionalists blind themselves to the distinctively American aspects of the American Constitution, this must be a cause for more general concern'. This writer further criticises those who 'have been unable to escape the predictable consequences of the Europeanization of constitutional theory': *id* at 4.

<sup>215</sup> Balkin, JM and Levinson, S (1998) 'The Canons of Constitutional Law' (111) *Harvard Law Review* 964 at 1005, note 134.

<sup>216</sup> *Lawrence* at 602 and 591, respectively.

nothing to teach US society, has no contribution to make (indeed, '[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home').<sup>217</sup> The legal other has nothing to teach US society either, has no contribution to make either.

In the same manner as the recognition of sexual minorities' rights is regarded as an emancipatory, empowering project, the recognition of foreign law can be regarded as an emancipatory, empowering project. Let me put it thus: in the same way as the queerness (ie, the foreignness/strangeness/uncanniness) of sexuality must matter to the US Supreme Court, the queerness (ie, the foreignness/strangeness/uncanniness) of law must matter to the US Supreme Court. Queer bodies must matter, 'queer' laws must matter too. In the same way as the proponents of sexual minorities' rights have been arguing in favour of the 'queerification' of US constitutional law, I argue in favour of the 'queerification' of the US Supreme Court's reservoir of references.

Now, the Court's succinct mention of foreign decisions is confusing inasmuch as it does not tell us what exactly it proposes to claim out of them. In this sense, this feature of the opinion arguably suffers from the same lack of clarity that has been said to characterise the holding.<sup>218</sup> One aspect of the matter appears transparent enough, though, and it is that the reference to foreign law was meant to establish the erroneous character of a statement in *Bowers v Hardwick* to the effect that '[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization' and that '[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards'.<sup>219</sup> By pointing to the European decision in *Dudgeon* and to the three European decisions that later applied it, *Lawrence* was able to show that the *Bowers* claim was 'at the very least [...] overstated'.<sup>220</sup> But is it the case that 'Justice Kennedy's cit[ations] to European authorities simply show that the legal norms of "a wider civilization" have not for some time been as [Chief] Justice [Warren] Burger imagined'?<sup>221</sup>

I argue that the foreign decisions in *Lawrence* are meant to do more work than simply cast a polite aspersion on *Bowers*. Even apprehending them in a strictly rhetorical key, as a 'rhetorical embellishment' if you will,<sup>222</sup> the European cases effectively act not simply to disable *Bowers* but also, affirmatively, to enable *Lawrence*.<sup>223</sup> As has been said, 'Justice Kennedy [...] cited foreign legal precedent [...] in support of the Court's ultimate

<sup>217</sup> *Lawrence* at 602 (Scalia J, dissenting).

<sup>218</sup> For this reason, the future of reference to foreign law remains in doubt. For a consideration of the range of options that *Lawrence* may herald as to the matter of the relevance of foreign law to US adjudication, see Alford, RP 'Federal Courts, International Tribunals, and the Continuum of Deference' supra note 194 at 926-29. In *US v Sampson*, 275 F Supp 2d 49 (D Mass, 2003) at 66, the Court cited *Lawrence* as regards the matter of the constitutionality of death penalty legislation, arguing that 'it is appropriate to consider in this case [...] the experience of other nations which share our traditions in determining contemporary standards of decency' (Wolf J).

<sup>219</sup> *Bowers v Hardwick* supra note 205 at 196 (Burger CJ, concurring).

<sup>220</sup> *Lawrence* at 571 (Kennedy J, for the Court). See also id at 573: 'the [European Court of Human Rights decision in *Dudgeon*] is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization' (Kennedy J, for the Court).

<sup>221</sup> Case, MA 'Of "This" and "That" in *Lawrence v Texas*' supra note 153 at 122, note 204 [my emphasis].

<sup>222</sup> Ruskola, T 'Gay Rights versus Queer Theory' supra note 152 at 246, note 17.

<sup>223</sup> Cf Glensy, R 'Which Countries Count?' supra note 193 at 443: 'In other words, the *Lawrence* majority's use of foreign materials served both a narrow and a broad purpose'.



holding', a normative impulse captured by the notion of 'persuasive authority'.<sup>224</sup> In another formulation, it was noted that the reference to foreign data in *Lawrence* purported 'to infuse the [US] Constitution with substantive meaning'.<sup>225</sup> Even though Justice Kennedy went out of his way in a later decision raising the same issue, *Roper v Simmons*, to insist that foreign cases are 'not controlling' — which, evidently, they are not — it remains that their very presence in a US Supreme Court opinion brings with them a normative aura.<sup>226</sup> Indeed, in *Roper*, Justice Kennedy observes that '[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions'.<sup>227</sup> In *Lawrence*, immediately after referring to *Dudgeon* and the three European cases that applied it, the Court writes as follows: 'The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent'.<sup>228</sup> What we have here, it seems to me, is reference being made to foreign law inasmuch as the foreign cases 'provid[e] respected and significant confirmation' for the Court's determination (to use, again, Justice Kennedy's language in *Roper v Simmons*).<sup>229</sup> To my mind, the Court's opinion thus seeks to derive a measure of 'normative purchase' of a confirmatory nature from the European decisions inasmuch as they support its goal, which is to point to the *truth-in-the-law* of the matter at hand.<sup>230</sup> The opponents to reference being made to foreign decisions are understandably worried (I mean, of course, 'understandably' from their antagonistic perspective). One can well appreciate why Justice Scalia — operating from his oppositional vantage point — regards the reference to foreign cases as 'dangerous'.

The main difficulty with the US Supreme Court's decision, then, is precisely that it adopts the truth-as-correctness model.<sup>231</sup> Indeed, in the majority opinion of the Court, Justice Kennedy writes thus: 'Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see

<sup>224</sup> Childress, DE 'Using Comparative Constitutional Law to Resolve Domestic Federal Questions' supra note 193 at 193-94 and 194, respectively.

<sup>225</sup> Larsen, JL (2004) 'Importing Constitutional Norms from a "Wider Civilization": *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation' (65) *Ohio State Law Journal* 1283 at 1326.

<sup>226</sup> *Roper v Simmons* supra note 185 at 578 (Kennedy J, for the Court). See McGinnis, JO (2006) 'Foreign to Our Constitution' (100) *Northwestern University Law Review* 303 at 306 note 16.

<sup>227</sup> *Ibid* [my emphasis].

<sup>228</sup> *Lawrence* at 577 (Kennedy J, for the Court).

<sup>229</sup> *Roper v Simmons* supra note 185 at 578 (Kennedy J, for the Court) (my emphasis).

<sup>230</sup> Cf Choudhry, S (1999) 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (74) *Indiana Law Journal* 819 at 890, where the author, referring to the universalist claim and to the argument from transcendence that underwrites it, notes how 'transcendence represents more than just an empirical claim that legal principles tend to be shared by many legal systems. Rather, it turns this empirical observation [made, I would add, in advance of any demonstration or based on the most superficial of demonstrations] into the premise of an argument for a normative conclusion: that the presence of a legal principle in many legal systems is evidence of its truth or correctness. Empirical convergence, in other words, is proof of moral truth'.

<sup>231</sup> See Teitel, R (2004) 'Comparative Constitutional Law in a Global Age' [Book Review] (117) *Harvard Law Review* 2570 at 2590, who notes that '[i]n both rhetoric and opinions, the current [US Supreme] Court increasingly relies upon the functionalist rationale for its growing comparative constitutional jurisprudence'. The Court thus 'posits a return to the reigning postwar comparative method': *id* at 2575.

that laws once thought necessary and proper in fact serve only to oppress'.<sup>232</sup> The express focus on 'truth' in the context of an 'enlightenment narrative' alluding to the passage from a condition of blindness to one of *voyance* suggests the existence of 'something' that one once did not see and that one now sees, of 'something' that has existed all along irrespective of one's inability to see it up until now, of 'something' that is there beyond anyone's ability to see or not to see it. Like Kötz, Gordley, and Markesinis, Justice Kennedy is locating 'truth-in-the-law' in a transcendental realm.<sup>233</sup> From the moment one is situating oneself in a 'beyond-any-law', it follows that 'the search for the right answer cannot be prejudiced by limiting the sources from which that answer is obtained to domestic sources alone'.<sup>234</sup> It also follows, as I will now attempt to demonstrate, that differences across laws and legal cultures are to be 'externalize[d]', the idea being that '[cultural] differences are manageable [only] when they can remain internal matters, below the waterline of sovereignty'.<sup>235</sup>

*Lawrence's* reference to *Dudgeon* summons the comparatist to take a closer look at the European decision. In *Dudgeon*, the issue was whether legislation in Northern Ireland criminalising sodomy was 'necessary in a democratic society for the protection of morals'. The matter turned on the interpretation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which at Article 8 reads as follows:

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In *Dudgeon*, the European Court of Human Rights observed that "'necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable"'. Rather, said the Court, it 'implies the existence of a "pressing social need" for the interference in question'. The Court noted that 'in assessing the requirements of the protection of morals in Northern Ireland, the contested measures must be seen in the context of Northern Ireland society. The fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member states of the Council of Europe does not mean that they cannot be necessary in Northern Ireland'. In the end, though, the Court found that there was no 'pressing social need' to make such acts as were contemplated by the local statute criminal offences. In the later case of *Norris*, also referred to by Justice Kennedy in *Lawrence*, the European Court of Human Rights held that the relevant issue was whether contested measures 'both answered a pressing social need and complied with the principle of proportionality'. The Court felt that there was

<sup>232</sup> *Lawrence* at 578-79.

<sup>233</sup> *Accord: Case, MA 'Of "This" and "That" in Lawrence v Texas' supra note 153 at 115, who takes the view that 'truths' here means 'eternal verities, not contingent, variable, or socially constructed'.*

<sup>234</sup> Glensy, R 'Which Countries Count?' supra note 193 at 387. See also Fried, C (2000) 'Scholars and Judges: Reason and Power' (23) *Harvard Journal of Law and Public Policy* 807 at 821, note 50.

<sup>235</sup> Kennedy, D (1997) 'New Approaches to Comparative Law: Comparativism and International Governance' *Utah Law Review* 545 at 568 and 571, respectively.

no pressing social need and no proportionality (ie, that the local justifications for the statute were outweighed by the detrimental effect that the law could have on the life of an individual).

Now, it is important to appreciate that 'proportionality' is more demanding on the state than mere 'reasonableness'. In other words, regardless of whether or not a local statute is reasonable, the European Court of Human Rights's view is that there must be proportionality between legislative goals and legislative means — while all one need establish in the US in order to sustain the validity of a law is that it is reasonable to further governmental interest.<sup>236</sup> This means that in Europe, the standard set for a law to survive the test is higher than in the US. Accordingly, European laws will be quashed more often than in the US where state laws can survive more easily. It may be thought odd, given this discrepancy, that Justice Kennedy in *Lawrence* used the European cases in order to make a point about US law. Why does the US Supreme Court feel that *Dudgeon* and *Norris* are offering it 'normative insight'?<sup>237</sup> After all, 'U.S. constitutional law does not ordinarily and explicitly resort to the idea of proportionality as a measure of constitutionality — even in the Eighth Amendment area, where the constitutional text seems to call for application of the idea of proportionality'.<sup>238</sup> When used, most conspicuously in a case of distribution of federal powers (and not, therefore, in a decision relating to individual rights),<sup>239</sup> the 'proportionality' standard has been said to 'provid[e] little if any principled guidance as to where the line will be drawn in any particular case'.<sup>240</sup> Other US commentators have been blunter: 'There is no nonarbitrary way to arrive at the proper legal rules, no way to get to sensible bottom lines by something that looks and feels like legal analysis. Whether proportionality review is lodged in appellate or trial courts, the only way to do it is to do it [...]. There is no metric for determining right answers, no set of analytic tools [...]. [...] All this amounts not just to open-ended judicial regulation — constitutional law has a lot of that, and courts do not seem terribly bothered by it — but also to *arbitrary* judicial regulation, regulation that produces outcomes untethered to any definable legal principle'.<sup>241</sup> In any event, it has been remarked that '[b]orrowing the term "proportionality" yields no guarantee, or even likelihood, that the concept will mean the same thing to our

<sup>236</sup> This distinction is clearly highlighted in Ramsey, MD (2004) 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*' (98) *American Journal of International Law* 69 at 74.

<sup>237</sup> Neuman, GL (2004) 'The Uses of International Law in Constitutional Interpretation' (98) *American Journal of International Law* 82 at 87.

<sup>238</sup> Jackson, VC (1999) 'Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism' (1) *University of Pennsylvania Journal of Constitutional Law* 583 at 619. Eg, *Harmelin v Michigan*, 501 US 957 (1991) at 965: 'We conclude [...] [that] the Eighth Amendment contains no proportionality guarantee' (Scalia J). The Eighth Amendment reads as follows: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'.

<sup>239</sup> Eg, *City of Boerne v Flores*, 521 US 507 (1997). This decision was followed in, eg *Tennessee v Lane*, 541 US 509 (2004) at 520 (Stevens J, for the Court); *Board of Trustees of the University of Alabama v Garrett*, 531 US 356 (2001) at 365 (Rehnquist CJ, for the Court); *Kimel v Florida Board of Regents*, 528 US 62 (2000) at 81-82 (O'Connor J, for the Court); *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*, 527 US 627 (1999) at 637 (Rehnquist CJ, for the Court).

<sup>240</sup> Cole, D (1997) 'The Value of Seeing Things Differently: Boerne v Flores and Congressional Enforcement of the Bill of Rights' *Supreme Court Review* 31 at 47.

<sup>241</sup> Stuntz, WJ (1997) 'The Uneasy Relationship between Criminal Procedure and Criminal Justice' (107) *Yale Law Journal* 1 at 73 [my emphasis]. For a review of the problems arising from the adoption of a proportionality test in the US, see Jackson, VC 'Ambivalent Resistance and Comparative Constitutionalism' supra note 238 at 619.

courts that it does to its originators, or that the results reached in the American context will mirror the results the doctrine yields in its home arena, even if we were certain that those results were to be emulated'.<sup>242</sup> For example, it has been argued that the distinctive features of US constitutional law call for 'a judicial policy of highly deferential review of exercises of federal power'.<sup>243</sup> The contrast with the European position, where it is understood that '[t]he most striking point about the doctrine of proportionality is that it leaves a great deal to the judgment of the Court',<sup>244</sup> could hardly be starker. Within European Community law, '[p]roportionality embodies a basic concept of fairness which has strengthened the protection of individual rights at both the national and supranational level'.<sup>245</sup> If, as Michael Ramsey puts it, '[i]n confronting sodomy laws, the ECHR and the U.S. Supreme Court faced entirely different interpretive questions arising from entirely distinct texts, with a distinct body of precedent elaborating upon what key phrases mean',<sup>246</sup> and if, given that '[e]very legal concept, every dogmatic construction, every line of legal argument operates in pre-determined traditional contexts',<sup>247</sup> if '[i]t is too simplistic to say that both are doing constitutional law, and so doing the same thing',<sup>248</sup> why, then, the approbative reference to 'proportionality' by the US Supreme Court? Why this assimilation in a situation, moreover, where although '[t]he grooves in the American legal mind lead one towards identifying the rights of the individual and the opposing interests of the state or community', European constitutional dynamics does not classically conceptualise state interventions as encroaching on the rights of citizens?<sup>249</sup> Thus, Mary Ann Glendon: 'Current American practices of judicial review, it is well to remember, have evolved under

<sup>242</sup> Kreimer, SF (1999) 'Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing' (1) *University of Pennsylvania Journal of Constitutional Law* 640 at 647.

<sup>243</sup> Jackson, VC 'Ambivalent Resistance and Comparative Constitutionalism' supra note 238 at 631-62.

<sup>244</sup> Hartley, TC (2003) *The Foundations of European Community Law* (5th ed) Oxford University Press at 152. See also Annus, T (2004) 'Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments' (14) *Duke Journal of Comparative and International Law* 301 at 313: '[A]dopting proportionality analysis actually requires the adoption of a normative position carrying a certain empirical assumption. This adoption normatively assumes that it is "right" to balance different values in constitutional adjudication. Further, proportionality analysis carries an empirical assumption that courts are the suitable venue for balancing conflicting values, that is, that certain positive consequences result from the fact that courts engage in this balancing. [...] Proportionality analysis is not a technical process'. This writer expressly connects the adoption of 'extensive proportionality analysis' by the courts with the 'judicialization of politics': id at 313, note 55. The 'reasonableness'/'proportionality' debate is significant in the UK. For a recent illustration of judicial awareness that the two standards differ, see *R v Secretary of State for Defence* [2003] EWCA Civ 473 (CA). Cf Fletcher, GP (1987) 'The Universal and the Particular in Legal Discourse' *Brigham Young University Law Review* 335 at 342, who, with specific reference to the law of negligence, points to what he calls the 'significant difference' between notions of reasonableness ('process of evaluation') and necessity ('supposed objectivity') and observes that '[e]ven if we could not establish a distinction in practice, it would be a mistake to treat these verbal approximations of negligence as equivalent or interchangeable'.

<sup>245</sup> Emiliou, N (1996) *The Principle of Proportionality in European Law* Kluwer at 1. See also, eg, Ellis, E (ed) (1999) *The Principle of Proportionality in the Laws of Europe* Hart.

<sup>246</sup> Ramsey, MD 'International Materials and Domestic Rights' supra note 236 at 74.

<sup>247</sup> Joerges, C (1995) 'The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines — An Analysis of the Directive on Unfair Terms in Consumer Contracts' (3) *European Review of Private Law* 175 at 183. As used in this sense, the word 'dogmatic' bears a characteristically German imprint. It roughly means 'doctrinal'.

<sup>248</sup> Ramsey, MD 'International Materials and Domestic Rights' supra note 236 at 74. It has been noted, for instance, that 'the role of the European Court under an international convention is not the same as that of the United States Supreme Court under [the US] federal Constitution': Glendon, MA (1991) *Rights Talk* Free Press at 153.

<sup>249</sup> Fletcher, GP (1993) 'Constitutional Identity' (14) *Cardozo Law Review* 737 at 742.

very specific historical circumstances. Much judicial activism in recent years, as well as the approval it has received from academics, and such popular acceptance as it has found, was attributable to a lack of confidence in our state legislatures. This American attitude, grounded to some extent in our troubled history of race relations, has no real counterpart in most other liberal democracies'.<sup>250</sup> Even a commentator saluting the 'actual convergence of decisions on certain issues', the 'constitutional cross-fertilization', and an 'emerging global jurisprudence',<sup>251</sup> applauding the fact that 'judges worldwide [are] engaged in a common enterprise of protecting human rights',<sup>252</sup> welcoming the practice pursuant to which 'courts are referring to each other's decisions',<sup>253</sup> talking the language of 'common fundamental values',<sup>254</sup> 'larger patterns and principles',<sup>255</sup> 'global norms',<sup>256</sup> 'universal norms',<sup>257</sup> 'global constitutional jurisprudence',<sup>258</sup> a 'global legal system',<sup>259</sup> a 'common judicial enterprise',<sup>260</sup> and a 'global community of human rights law',<sup>261</sup> even someone subscribing to 'a deeper common identity' set against 'the pluralism of multiple legal systems',<sup>262</sup> even such an observer, then, stresses the specificity of *Dudgeon* and argues that the European case, in which the European Court of Human Rights 'ha[s] relied on uniquely European legal developments to expand the scope of Convention rights',<sup>263</sup> offers 'a peculiarly European interpretation of human rights standards' and 'a specialized view of human rights'.<sup>264</sup> Are we not dealing, therefore, with different discursive fields, with different political rationalities, with different explanatory logics such that in each case constitutional doctrines are articulated 'in relation to some understanding of the spaces, persons, problems, and objects to be governed',<sup>265</sup> with the result that 'different political forces infuse the various elements with distinct meanings, link them within distinct thematics, and derive different conclusions as to what should be done, by whom and how'?<sup>266</sup> Are we not dealing with two different epistemological clusters? Why, then, the US Supreme Court's appropriation of a European discourse already-in-being to a US discourse already-in-being (which, *concessio non dato*, I will assume is meant to be hospitable)?

<sup>250</sup> Glendon, *MA Rights Talk* supra note 248 at 161-62.

<sup>251</sup> Slaughter, A-M *A New World Order* supra note 198 at 78.

<sup>252</sup> *Id* at 81.

<sup>253</sup> *Id* at 66.

<sup>254</sup> *Id* at 69.

<sup>255</sup> *Ibid*.

<sup>256</sup> *Id* at 99.

<sup>257</sup> *Id* at 102.

<sup>258</sup> *Id* at 66.

<sup>259</sup> *Id* at 67.

<sup>260</sup> *Id* at 68.

<sup>261</sup> *Id* at 69.

<sup>262</sup> *Id* at 103.

<sup>263</sup> Helfer, LR and Slaughter, A-M (1997) 'Toward a Theory of Effective Supranational Adjudication' (107) *Yale Law Journal* 273 at 384.

<sup>264</sup> *Id* at 384, note 496. Europe-US differences, with specific reference to regulation of sexual minorities, are also stressed by Case, MA 'Of "This" and "That" in *Lawrence v Texas*' supra note 153 at 127. (Incidentally, this point shows how the idea that one can draw an analogy between the consideration of laws across states within the US with that of foreign laws is unsustainable and fails to account for the specificity of the 'foreign'. Yet, this parallel is endorsed in Abrahamson, SS and Fischer, MJ (1997) 'All the World's a Courtroom: Judging in the New Millennium' (26) *Hofstra Law Review* 273 at 285-86.)

<sup>265</sup> Rose, N *Powers of Freedom* supra note 86 at 26-27.

<sup>266</sup> *Id* at 28.

I argue that the answer lies with the truth-as-correctness model, which, as I observed, does not care for context and aims for transcendentalisation. One is, here again, witnessing the transcendental imperative in action, so to speak. In effect, Justice Kennedy is 'looking only at the precept element in legal systems'.<sup>267</sup> For him, all that matters is the fact that *Dudgeon* addresses a law criminalising certain sexual conduct. He is acting as if *Dudgeon* was somehow 'culture neutral', as if laws were not intimately connected with the world from which they emerge and in which they find themselves. As such, there is no recognition on Justice Kennedy's part that 'constitutional constraints rest on culturally contingent social categories'.<sup>268</sup> All distinctions are abolished, the non-synthesisable dimensions pertaining to *Dudgeon* and *Lawrence* are suppressed, leaving a general, undifferentiated textuality. In the mind of Justice Kennedy, there is identity of precept, which translates into formal identity: '[T]he assumption [is] that whatever is being examined [...] differs little from what exists in [the US] legal system'.<sup>269</sup> Indeed, in *Lawrence*, the European Court of Human Rights decisions are cited, for all intents and purposes, exactly as if they were US cases.<sup>270</sup> In the belief (untested by either theoretical reflection or empirical practice) that a methodology can be devised enabling one to interpret across boundaries in such a way as to achieve uniquely correct interpretations,<sup>271</sup> foreign material is decontextualised and, on the basis of this act of exclusion, transported to a beyond-any-law where it becomes right, correct, true — without any consideration being given to the structures of understanding that make it possible for *Dudgeon*, a European case that exists as a meaningfully structured (and structuring) situation, to be relevant to the US case of *Lawrence*, also a meaningfully structured (and structuring) situation. Not only is *Dudgeon* asserted to be right, correct, and true, it is asserted to be right, correct, and true *like US law*. In the same way as the critic is 'forced' to conclude to the superiority of German law on 'offer', 'the U.S. Constitution [becomes] not only a descriptive but a prescriptive norm for constitutional design'.<sup>272</sup> The point of departure is US law — let us say, the unalloyed good or the right, correct, true re-presentation of the ideal — and this law is then extended to other laws: the process is one of universalisation through the projection of US law. In other words, the process is one

<sup>267</sup> Pound, R (1955) 'Comparative Law in Space and Time' (4) *American Journal of Comparative Law* 70 at 75. Pound was expressly critical of this approach: 'a fruitful comparative law [...] has to do much more than set side by side sections of codes or of general legislation' (or, one could no doubt add, citations to judicial decisions): *ibid.* For an insightful appreciation of Pound's thought, see Lasser, M (2002) 'Comparative Readings of Roscoe Pound's *Jurisprudence*' (50) *American Journal of Comparative Law* 719.

<sup>268</sup> Schauer, F (1993) 'Free Speech and the Cultural Contingency of Constitutional Categories' (14) *Cardozo Law Review* 865 at 880.

<sup>269</sup> Alford, WP (1986) 'On the Limits of "Grand Theory" in Comparative Law' (61) *Washington Law Review* 945 at 958.

<sup>270</sup> More accurately, they are treated worse than US cases if only because only the barest material facts are mentioned, no statutes are quoted, and no excerpts from judicial opinions are discussed.

<sup>271</sup> The problematic character of this assumption is highlighted in White, JB (1985) *Heracles' Bow* University of Wisconsin Press at 63: 'the most serious obstacles to comprehensibility are not the vocabulary and sentence structure employed in the law, but the unstated conventions by which the language operates: what I call the "invisible discourse" of the law. Behind the words, that is, are expectations about the ways in which they will be used, expectations that do not find explicit expression anywhere but are part of the legal culture that the surface language simply assumes. These expectations are constantly at work, directing argument, shaping responses, determining the next move, and so on. Their effects are everywhere, but they themselves are invisible. It is these conventions, not the diction, that primarily determine the mysterious character of legal speech and literature — not the "vocabulary" of the law, but what might be called its "cultural syntax".'

<sup>272</sup> Balkin, JM and Levinson, S 'The Canons of Constitutional Law' *supra* note 215 at 1006.

of universalisation through the advancement of particular values (as is indeed the case with any natural-law or quasi-Platonic doctrines). *Mirabile visu*, there emerges a European 'law' that is decontextualised, that is rendered independent from its European horizon, that is de-Europeanised. There is, if you like, a European law without any European dimension. *Mirabile dictu*, this deracinated law is found to be enunciating the same thing as US doctrine. One recognises here the underlying claim to transcendence, universality, and, ultimately, unity. Indeed, it is maintained that 'the judgments that have been written by courts around the world point very strongly to the existence of universal principles of law'.<sup>273</sup> From there, the convergence of constitutional opinions is readily apprehended as the onset of greater rationality, ie, as a progress towards greater truth-in-the-law. One is back to the Enlightenment *Weltanschauung* which Kant has made familiar and which, more recently, Jürgen Habermas and his argument to the effect that truth-claims are claims to intercultural, universal validity has invigorated.<sup>274</sup> The process of de-differentiation in which the US Supreme Court engages appears to operate as follows.

The synthesis, which is meant to be a conjunctive synthesis (*Lawrence + Dudgeon*) overlooking (silenced) singularities, is in effect a distorting synthesis at least in its form  $A = B$ : it goes beyond any lived or liveable experience; it exists only in thought. Paradoxically perhaps, this distortion has creative power in that it disturbs the economy (or *oikos*) of the world of US law. The identity of *Dudgeon* is dissolved. *Dudgeon* is no longer defined by its self, by its identity, but through a process of becoming. It dissolves in a purportedly objective zone of indistinction or indiscernibility: *Dudgeon* becomes *Lawrence*, *Dudgeon* enters an area where it can no longer distinguish itself from *Lawrence*. It is not just in *Lawrence* (which it emphatically is), but it is of *Lawrence*: it is *Lawrence*, such that 'even though the persuasive authority might come from a geographically "foreign" place, in reality, the overlapping normative convergence makes it so that the authority referenced is not "foreign" at all'.<sup>275</sup> Along the way, *Lawrence* too becomes something else: it loses its texture as a typical US decision. At the same time as it domesticates *Dudgeon* (ie, as it assumes power over it through its hallucinating — etymologically, 'wandering' — gaze), *Lawrence* marginalises itself within US judicial discourse as it retains a new formation of sovereignty which explicitly purports to derive 'normative purchase' from foreign law. So, as *Dudgeon*-as-becoming (the case's transmutation into US law) is made to enter into a becoming (the Supreme Court's decision to move into other-than-straightforward-US-law), there is a process of deterritorialisation taking place. More precisely, the US court assimilates *Dudgeon* as it is looking for a territoriality of support to sustain its process of reterritorialisation (ie, the way in which it is repositioning itself within US law). In the end, there is premature totalisation, that is, a glossing over a myriad differences for the sake of attaining a single, transcendental, disincarnated form (which, again, is re-formulated via the US Supreme Court's own apprehension: in the same way as one encountered Kötz's, Gordley's, or Markesinis's brand of transcendentalism, one here meets the US Supreme

<sup>273</sup> Beatty, D (1996) 'Law and Politics' (44) *American Journal of Comparative Law* 131 at 141. For another argument in favour of universality, see, eg, Weinrib, LE (2002) 'Constitutional Conceptions and Constitutional Comparativism' in Jackson, VC and Tushnet, M (eds) *Defining the Field of Comparative Constitutional Law* Praeger 3.

<sup>274</sup> See Appendix II.

<sup>275</sup> Glensy, R 'Which Countries Count?' supra note 193 at 423. For a thoughtful argument along these lines, see Amann, DM (2004) "'Raise the Flag and Let It Talk": On the Use of External Norms in Constitutional Decision Making' (2) *International Journal of Constitutional Law* 597.

Court's). Justice Kennedy 'tells us nothing interesting about the European case. The citation is mere ornamentation, like a trill in a cadenza. The only thing we learn is that it exists and that it presumably supports his argument. Should we want to know anything more, we must ourselves go to the library (or log onto the Internet) and track the case down'.<sup>276</sup>

What the US Supreme Court does, in sum, is, to quote Kötz, to 'cut [Dudgeon] loose from [its] conceptual context and stri[p] [it] of [its] national doctrinal overtones'.<sup>277</sup> In the words of Gordley, '[t]here [is] nothing distinctively [European] about the decisio[n] [itself]'.<sup>278</sup> Once there takes place a re-statement 'in terms of precise and narrow rules' (Schlesinger's formula),<sup>279</sup> it becomes clear, as Markesinis would put it, that 'foreign law is not very different from [US law] but only appears to be so'.<sup>280</sup> Kötz thus finds himself vindicated: 'different legal systems give the same or very similar solutions, even as to detail, to the same problems of life'.<sup>281</sup> And Unidroit too is seen to be justified in promoting 'a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied'.<sup>282</sup>

*What one does not see, though*, is even basic acknowledgement that any law operates in connection with other things, that it connects with surfaces, networks, and circuits around which it flows, that it is the result of the affects and passions that it mobilises. *What one does not see, though*, is even basic acknowledgment of the epistemological, institutional, and cultural conditions for the production and circulation of law. *What one does not see, though*, is even basic acknowledgment that laws are articulated in relation to some understanding of the spaces, persons, problems, and objects to be governed. *What one does not see, though*, is even basic acknowledgment that law is a species of political rationality and that '[p]olitical rationalities are discursive fields characterized by a shared vocabulary within which disputes can be organized, by ethical principles that can communicate with one another, by mutually intelligible explanatory logics, by commonly accepted facts, by significant agreement on key political problems'.<sup>283</sup> *What one does not see, though*, is even basic acknowledgment that different political rationalities are infused with various elements with distinct meanings, which are linked within distinct thematics, and which lead to the derivation of different conclusions as to what should be done, by whom, and how. *What one does not see, though*, is even basic acknowledgment that articulation of values, validity, and authority are concomitant aspects of localism. *What one does not see, though*, is even basic acknowledgment that even such a fundamental notion as 'free speech', for example, is un-universalisable (no matter 'the universalising impetus of [its]

<sup>276</sup> Levinson, S (2004) 'Looking Abroad When Interpreting the U.S. Constitution: Some Reflections' (39) *Texas International Law Journal* 353 at 363.

<sup>277</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 44. For the original text, see *id Einführung in die Rechtsvergleichung* supra note 117 at 43 ['Die Lösungen der untersuchten Rechtsordnungen sind von allen systematischen Begriffen dieser Rechtsordnungen zu befreien, aus ihren nur-nationalen dogmatischen Verkrustungen zu lösen'].

<sup>278</sup> Gordley, J 'Comparative Legal Research' supra note 129 at 563.

<sup>279</sup> Schlesinger, RB 'Introduction' supra note 141 at 9.

<sup>280</sup> Markesinis, BS 'The Destructive and Constructive Role of the Comparative Lawyer' supra note 130 at 443.

<sup>281</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 39.

<sup>282</sup> Governing Council of Unidroit, 'Introduction' supra note 128 at viii.

<sup>283</sup> Rose, N *Powers of Freedom* supra note 86 at 28.



form').<sup>284</sup> In fact, there cannot be an ahistorical entity called 'free speech' since there is no ahistoricist universalist transcendentalism other than in the minds of its proponents. Nor can the various 'free speeches' all over the world be taken somehow to designate 'a fragmented organism'; rather, they are but 'an emission of pre-individual and pre-personal singularities, a pure dispersed and anarchic multiplicity, without unity or totality, and whose elements are welded, pasted together by the real distinction or the very absence of a link'.<sup>285</sup> The same goes for any notion of 'due process' or 'fundamental right' or 'privacy'. The same goes for any 'right'. *What one does not see, though*, is that in a case like *Lawrence* we have but 'a particularism gone global' — which is to say that the purported 'universal' is haunted by the 'particular' (no matter how unstable these categories), meaning that if the universal cannot escape the spectral presence of the particular, the particular must escape universalisation.<sup>286</sup> The 'universal' becomes an 'empty signifier', a signifier without signified, a signifier perennially in quest of a referent,<sup>287</sup> a claim that one can readily substantiate by pointing to the fact that nowadays 'to accept universality does not [even] mean that each culture has to understand a right in precisely the same way or accept the whole range of rights'.<sup>288</sup> *What one does not see, though*, is that in the end (and quite contrary to the superficial claims made by the partisans of legal universals) there is no dialogue materialising at all in *Lawrence* for European law is not even allowed to express itself as the law that it is. Indeed, it is arguable that standardisation (of the kind pursued by the US Supreme Court and advocated by the defenders of one-world-law-that-happens-to-look-remarkably-like-US-law), as it cancels pluralism (which is 'at odds with [...] the quest for a unified system of values and for consistent Right Answers'), endangers constitutional conversation and, ultimately, thwarts democracy.<sup>289</sup>

(There is, of course, another dimension to which the promoters of one-constitutional-law-for-the-world conveniently close their eyes concerning the way comparative

<sup>284</sup> Douzinas, C (2000) *The End of Human Rights* Hart at 139. Compare *American Booksellers Ass'n v Hudnut*, 771 F 2d 323 (7th Cir 1985), which declared unconstitutional a municipal ordinance that prohibited the 'production, sale, exhibition, or distribution' of the material it defined as pornographic because it violated the First Amendment guaranteeing free speech, with the Canadian decision in *R v Butler* [1992] 1 SCR 452, holding the opposite. For another comparison as regards hate speech, allowed in the US but banned in Canada, see, respectively, the United States and Canadian supreme courts' decisions in *RAV v City of St. Paul, Minnesota*, 505 US 377 (1992) and *R v Keegstra* [1990] 3 SCR 697. I deliberately choose US and Canadian examples in order to show that even two countries so close geographically and historically differ even as regards something as fundamental as free speech. For a wider claim, see Rosenfeld, M (2001) 'Constitutional Migration and the Bounds of Comparative Analysis' (58) *New York University Annual Survey of American Law* 67 at 71-72: 'a cursory review of various freedom of speech provisions drawn from numerous constitutions throughout the world reveals a striking similarity in the formulation of that right. Examination of how freedom of speech is construed in various countries, however, reveals huge discrepancies ranging from virtually unconstrained liberty to extensive speech regulation'.

<sup>285</sup> Deleuze, G and Guattari, F (1973) *L'Anti-Oedipe* (2nd ed) Editions de Minuit at 386-87 [*'non pas un organisme morcelé, mais une émission de singularités pré-individuelles et pré-personnelles, une pure multiplicité dispersée et anarchique, sans unité ni totalité, et dont les éléments sont soudés, collés par la distinction réelle ou l'absence même de lien'*].

<sup>286</sup> See Schneiderman, D (2002) 'Comparative Constitutional Law in an Age of Economic Globalization' in Jackson, VC and Tushnet, M (eds) *Defining the Field of Comparative Constitutional Law* Praeger at 244.

<sup>287</sup> Laclau, E (1996) *Emancipation(s)* Verso at 36-46.

<sup>288</sup> Ghai, Y (2000) 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims' (21) *Cardozo Law Review* 1095 at 1102.

<sup>289</sup> For a thoughtful argument along these lines in the context of the US debate on judicial review, see Schwarzschild, M (2001) 'Pluralism, Conversation, and Judicial Restraint' (95) *Northwestern University Law Review* 961 at 974.

constitutional law acts as ‘an agent of economic globalization’,<sup>290</sup> the basic point being that a marginalisation of legal pluralism entails a downgrading of economic pluralism — something which, ultimately, signifies the triumph of imperial neoliberalism, ie, of ‘limited government and the subordination of politics to economics’.<sup>291</sup> Once all is said and done, ‘[c]onstitutional law [...] aspires to generate one large free trade zone’.<sup>292</sup> I readily accept that this point may not be as spectacular in a context where the issue concerns the emancipation of sexual minorities and where US institutions claim to be deriving assistance from Europe. But when Upendra Baxi refers to the manner in which the Second Amendment is globalised ‘in ways that convert the American people’s right to bear arms into the universal right of the American industrial-military complex to sell arms worldwide’, he is effectively arguing the same point that one can make vis-à-vis *Lawrence*: the marshalling of European standards in order to stabilise the US standard neither makes the US standard universal nor does it turn it into a *telos* to which any society should be aspiring. It merely globalises what remains a standard deriving much of its operative sense historically and culturally, although purporting to serve as a cross-cultural criterion for making legal — and, no doubt, moral — judgments about sexual rights.<sup>293</sup>

While I respect authorial intention as expressed in the work of orthodox comparatists-at-law or in the decision-making of the US Supreme Court, I think it foolish to assume that one can simply move away from the constraints of embedded meaning, and that it is mistaken to argue that one ought to be doing so. I claim the right to question such doxastic truth-claims in the interest of a more enlightened understanding, of a primordial understanding, of an understanding of the law’s authenticity — something which can be done without excessive particularisation (since, of course, there is a degree of specificity at which every set of constitutional arrangements becomes unique),<sup>294</sup> something that must be done by the comparatist-at-law *bearing witness*. Given the shortcomings of the truth-as-correctness model — an unthought axiomatics that fails to allow for the culture-specific frameworks that play a crucial role in establishing the conditions of possibility (and

<sup>290</sup> Schneiderman, D ‘Comparative Constitutional Law in an Age of Economic Globalization’ supra note 286 at 244. In this author’s words, ‘recent work in comparative constitutional law [...] maintains a comfortable distance from questions of political and economic power’: id at 239. But see McCrudden, C (2000) ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (20) *Oxford Journal of Legal Studies* 499 at 529-32.

<sup>291</sup> Schneiderman, D ‘Comparative Constitutional Law in an Age of Economic Globalization’ supra note 286 at 238. Cf Spivak, GC (1988) *In Other Worlds* Routledge at 168: ‘A “culturalism” that disavows the economic in its global operations cannot get a grip on the concomitant production of barbarism’.

<sup>292</sup> Schneiderman, D ‘Comparative Constitutional Law in an Age of Economic Globalization’ supra note 286 at 240. See also id (2000) ‘Investment Rules and the New Constitutionalism’ (25) *Law and Social Inquiry* 757 at 757-59. Indeed, even Slaughter — whose ‘discourse harkens back to earlier comparativist scientizing’ (Teitel, R ‘Comparative Constitutional Law in a Global Age’ supra note 231 at 2586, note 74) — admits that the ‘presumption of an integrated system’ must ‘res[t] on a conception of a single global economy’: Slaughter, A-M *A New World Order* supra note 198 at 86.

<sup>293</sup> Baxi, U (2000) ‘Constitutionalism as a Site of State Formative Practices’ (21) *Cardozo Law Review* 1141 at 1195.

<sup>294</sup> Such unhelpful particularisation would materialise, for instance, if the act of embeddedness was itself embedded and if this embeddedness was itself embedded, and so forth. Cf Widner, J (1998) ‘Comparative Politics and Comparative Law’ (46) *American Journal of Comparative Law* 739 at 745, who, writing about comparative analysis in politics, notes that ‘[t]here are tradeoffs between accuracy, generality, and parsimony’. In this sense, I join with Derrida who, through his notion of ‘iterability’, claims that dependence on embeddedness must be ultimately limited. In his words, ‘a written sign contains a power of severance from its context’: Derrida, J (1972) *Marges Editions de Minuit* at 377 [‘un signe écrit comporte une force de rupture avec son contexte’].

impossibility) for legal thought and legal experience in general, that moreover ignores the embeddedness of law, that engages in a massive (and massively implausible) catachresis –, a task is prescribed.<sup>295</sup> The serious comparatist-at-law is compelled to fashion an alternative framework that will acknowledge the ‘take-home’ point that, unlike what is claimed for the metric system, Greenwich Mean Time, and ‘dot.com’,<sup>296</sup> no conception of law can be said to be transnational, for no conception of law can be shorn of world – which is another way to say that every conception of law is inscribed within experiential world.<sup>297</sup> This matter is far from being only an academic debate. Behind the seemingly esoteric questions raised by comparative legal studies, broader issues of a political sort can be seen to surface. One of these concerns the political communication and interaction appropriate to our global world.

•

One must be careful not to overrate the binarism of the self-and-other distinction: nothing is fully or purely autochthonous or foreign. Thus, even if the US Supreme Court’s enticement for European law could be said to be directed at ‘the project of recovering or discovering the true structure of the national discourse from ideas of foreign manufacture’,<sup>298</sup> it would arguably still be operating *within* US culture. Stepping ‘outside’ culture in the way that culture allows one to do is arguably still a way of experiencing culture (and its network of inherent dependencies) rather than shedding it (the point being that with each attempt to evade the limits of culture, to embrace an ‘outside-of-culture’, one expands one’s frame and

<sup>295</sup> I use the idea of ‘catachresis’ to signify ‘the lack of an “adequate historical referent” in the cultures of the Other’: Baxi, U (2002) *The Future of Human Rights* Oxford University Press at 102, referring back to Spivak, GC (1995) ‘Constitutions and Culture Studies’ in Leonard, J (ed) *Legal Studies as Cultural Studies* State University of New York Press at 166. *Contra*: Fontana, D ‘Refined Comparativism in International Law’ supra note 193 at 541, note 4: ‘the refined comparativist judge should stick to the examination of formal texts’. The author means, of course, ‘formal legal texts’, which he defines as ‘judicial opinions, constitutional text’: id at 553, note 67 [my emphasis]. For greater clarity, the author observes that if US judges are interested in ‘law in action’ in foreign jurisdictions, they should try to ‘glean insights about how the law has actually worked from those [formal legal texts]’: ibid. This, it is noted, ‘would be less objectionable [...] than it would be [...] to use an article on comparative legal sociology, for example’: ibid. It seems clear that the author’s notion of ‘refinement’ as he applies it to comparative legal studies involves refinement-as-reductionism rather than refinement-as-sophistication. Yet, even that writer feels bound to acknowledge (somewhat paradoxically given his formalistic commitment) that ‘the skilled comparativist must be able to analyse comparative constitutional law within the context of general institutional practices’: id at 620. To return to *Lawrence*, it must be noted that ‘technically’, so to speak, the US Supreme Court is not confined to a reductive approach. The relevant rules of civil procedure make it plain that ‘[t]he court, in determining foreign law, may consider any relevant material or source, including a testimony, whether or not submitted by a party’: Fed R Civ P 44.1. The relevant rules of evidence allow the court to appoint an expert on its own motion in order to get assistance on a question of foreign law: Fed R Evid 706.

<sup>296</sup> These analogies are suggested in Koh, HH (2001) ‘The Globalization of Freedom’ (26) *Yale Journal of International Law* 305 at 306. But, surely, law cannot be reduced to units of measurement or digital systems. In any case, as Nick Foster helpfully underlines, the metric system, Greenwich Mean Time, and ‘dot.com’ are historically contingent and continue to harbour strong local associations.

<sup>297</sup> A parallel can be drawn with philosophical conceptions. See, eg, Derrida, J (1991) *Donner le temps*, vol I: *La fausse monnaie* Editions Galilée at 76: ‘is it not impossible to bring out a concept of essence [...] that would transcend idiomatic difference?’. Derrida adds: ‘the essential link of thought to language, or in any event to the trace, will never dispense with idioms’ [‘n’est-il pas impossible de dégager un concept de l’essence (...) qui transcende la différence idiomatique? / ‘le lien essentiel de la pensée (...) au langage, ou en tout cas à la trace, ne fera jamais l’économie des idiomes’].

<sup>298</sup> Spivak, GC ‘Constitutions and Culture Studies’ supra note 295 at 160.

brings more of the world into it such that one never escapes the frame). My difficulty with the US Supreme Court's comparativism lies elsewhere and focuses on '[t]he negotiative precariousness of the enterprise' of transcultural comparativism.<sup>299</sup> I argue that, in its treatment of the European decisions, the Court puts the cultural text under erasure thereby avoiding the pervasive and unavoidable cultural significance of the European cases. By ignoring the way in which the 'legal' is necessarily informed by the cultural (which, saliently, here includes the political), by overlooking the way in which *Dudgeon* is always-already factual and historical, the Court treats as a 'beyond-the-law' what is in effect most emphatically the 'within-the-law'. As such, the Court denies the European texts' inherent impregnability. In other words, for the Court '[t]he subject of comparative analysis is the legal problem, excised from its context'.<sup>300</sup> Comparativism becomes a 'technique of problem solving',<sup>301</sup> which accounts for the fact that the Court uses comparative materials 'as a basis for the resolution of specific constitutional issues, particularly in areas of unsettled law'<sup>302</sup> — and which shows that the Court's relationship with European law is far from being merely contemplative and that it belongs to the realm of combat and conquest, that it implies the activity of formation, of selection, of set purpose. In an admittedly different context and in order to serve an admittedly different argument, Gunther Teubner makes a point that I think helpful and that I want to use for my own ends: 'the fragmentation of global law is not simply about legal norm collisions or policy-conflicts, but rather has its origin in contradictions between society-wide institutionalized rationalities, which law cannot solve'.<sup>303</sup> The assumptions underlying the US Supreme Court's comparative intervention as it purports to move towards universal, natural-law like doctrines are that the problem of cultural understanding, ultimately, does not exist, that it is a mock issue. But can it not be said that ethnocentrism — in the sense of an *undue* projective or incorporative identification within the transferential dynamics involved in any relation between self and other — is at its most menacing, at its deepest and most irreducible, when it begins to think of itself as being anti-ethnocentric? Can it not be said, then, that the more ethical the US Supreme Court attempts to be, the more unethical it effectively becomes? Again, my point is emphatically not to 'reify' insider-outsider knowledge into solipsisms and to deny the permeability of 'boundaries' between positions.<sup>304</sup> Specifically, I am not addressing the epistemological problem of whether there can be something like exclusive or privileged insider knowledge on the matter of European law (although, epistemological beings being necessarily situated and on that account fields of knowledge being unable to be infinite, the fact is that 'there is no social location or analytical position from which the truth value of a text or discourse may be judged').<sup>305</sup> My point is that no matter how much the US Supreme Court can ever understand of the European Court of Human Rights, the European law that is on offer in *Lawrence* is not European law in any meaningful sense. The *Dudgeon*

<sup>299</sup> Id at 169.

<sup>300</sup> Teitel, R 'Comparative Constitutional Law in a Global Age' supra note 231 at 2574.

<sup>301</sup> Ibid.

<sup>302</sup> Id at 2590.

<sup>303</sup> Fischer-Lescano, A and Teubner, G (2004) 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (25) *Michigan Journal of International Law* 999 at 1004.

<sup>304</sup> A well-known argument against this dichotomy is in Merton, RK (1972) 'Insiders and Outsiders: A Chapter in the Sociology of Knowledge' (78) *American Journal of Sociology* 9. I am grateful to Michael Palmer for suggesting this reference.

<sup>305</sup> Scott, JC (1990) *Domination and the Arts of Resistance* Yale University Press at x.

that the US Supreme Court puts forth in support of its decision is not *Dudgeon*. It is not even a facsimile of *Dudgeon*. It is, at best, an ersatz. *Dudgeon* has been un-*Dudgeoned*.<sup>306</sup> It has been denied its individuality through an act of institutional violence that ‘abstracts problems from their particular contexts to arrive at a constitutionalism hardly identifiable with politics or place’.<sup>307</sup> There is simply no acknowledgment of ‘the extent to which constitutional problems are informed by politics and culture’.<sup>308</sup> But even allowing that the European court can be said to be speaking on account of the mere fact that it is *cited*, it remains the case that the European and US courts are not speaking the same language such that the very idea of ‘dialogue’ becomes problematic and could advantageously find itself replaced by that of ‘negotiation’.<sup>309</sup>

In sum, there are at least three problems with the situation exemplified by *Lawrence*. First, the US Supreme Court is betraying foreign law by failing to restore it (if in ways creative and inventive).<sup>310</sup> This goes to loyalty. Secondly, the Court is misrepresenting the legal dynamics at play through an undemonstrated assumption of similarity of foreign law to US law which is, as a matter of what is the case in advance of any theoretical elaboration (there *are* two laws), unsustainable. This goes to probity. Thirdly, the Court is undermining comparative legal studies. This goes to integrity.<sup>311</sup> Again, the point is not, of course, to support anything like legal atomisation such that comparison-at-law would be regarded as inherently indefensible. No comparatist-at-law could want *that*. The argument is about the form of knowledge appropriate to comparison. And the view I defend is that the epistemic demands that must be made on anyone purporting to think through foreign law are significantly higher than the US Supreme Court was willing to acknowledge in *Lawrence*. To encapsulate the claim in different language, if one wants to reform one’s law, one can import all that one wants and there is nothing like a duty of fidelity. One can be as instrumental as one likes! But if one wants to reform one’s law *by pointing to what the law is like elsewhere* (as was done in *Lawrence*), then it behoves one to give an authentic picture of what that foreign law is indeed like. The objection to the effect that ‘judicial comparativism’ should be held to a lower standard is unconvincing (and, frankly, somewhat demeaning to the Court and its Justices). To suggest that the US Supreme Court lacks the resources to engage in credible comparativism is disingenuous.<sup>312</sup> After all, sensitivity to different rationalities of governance or to different structures of experience and the production of

<sup>306</sup> Of course, ultimately, *Dudgeon* continues to abide by itself for ‘[e]ntities are, quite independently of the experience by which they are disclosed, the acquaintance in which they are discovered, and the grasping in which their nature is ascertained’: Heidegger, M *Being and Time* supra note 138 at 228 [emphasis original]. For the original text, see id *Sein und Zeit* supra note 138 at 183 [‘*Seiendes ist unabhängig von Erfahrung, Kenntnis und Erfassen, wodurch es erschlossen, entdeckt und bestimmt wird*’] (emphasis original).

<sup>307</sup> Teitel, R ‘Comparative Constitutional Law in a Global Age’ supra note 231 at 2577.

<sup>308</sup> Id at 2578. Cf Tushnet, M (1999) ‘The Possibilities of Comparative Constitutional Law’ (108) *Yale Law Journal* 1225 at 1239: ‘Identifying common functions across constitutional systems is always problematic because doing so inevitably omits institutional details unique to the systems being compared’.

<sup>309</sup> See Derrida, J (with Labarrière, P-J) (1986) *Altérités* Osiris at 85. For an argument regarding the role of ‘negotiation’ *within* cultures, see Amsterdam, AG and Bruner, J *Minding the Law* supra note 203 at 231.

<sup>310</sup> See Ramsey, MD ‘International Materials and Domestic Rights’ supra note 236 at 79, where the author argues that the Court ‘displays [...] a lack of respect for international sources’.

<sup>311</sup> Id at 82. Cf Jackson, VC ‘Ambivalent Resistance and Comparative Constitutionalism’ supra note 238 at 601: ‘If comparison is (or is becoming) inevitable, then comparison should be conscious, knowing, well-informed, and reasoned’.

<sup>312</sup> Extraordinarily, this argument has however been advanced by at least two Justices. See Breyer, S ‘Keynote Address’ supra note 187, pp. 267-68; Souter J, concurring, in *Washington v Glucksberg*, 521 US 702 (1997) at 787.

an open, polyvocal text in which competing discourses can be loyally re-presented hardly requires the Justices or their clerks to embark on the writing of doctoral dissertations.



There are those who like economics with their dinner.<sup>313</sup> Here, then, is an ‘economic’ argument. The cycle of self-reinforcing activity characteristic of path-dependent processes — such as common-law adjudication — suggests that, in line with the idea of increasing returns (or decreasing cost conditions), incremental change is heavily weighted in favour of decisions consistent with the existing institutional framework. Thus, it has been convincingly argued that inasmuch as it constitutes a derogation from settled judicial practice, ‘[i]ncluding extraneous statements in an opinion invites later reliance on those statements and thus multiplies the costs of a nonergodic common law system’. Path-dependence, therefore, ‘counsels judges to include in an opinion no more than what is necessary to decide the case at hand thoroughly and completely’ — a claim that clearly militates against reference to foreign materials as inefficient. Indeed, the bounded rationality within which any institution operates — including the US Supreme Court — becomes particularly problematic in the context of reference to foreign law, for in this instance the imperfect or incomplete nature of the information available to legal actors (say, judges) proves even more debilitating than usual. It remains to be seen whether academics promoting self-styled ‘comparative-law-and-economics’ will ultimately adjudicate for economic theory or for comparative legal studies.<sup>314</sup>

Needless to say, I claim that the dilemma must resolve itself in favour of comparison. I argue that economic analysis of law has little to contribute to our quest for an understanding of law as long as it continues to suck life out of the law and approach law at a level of abstraction that is completely detached from its *Lebenswelt*. While hiding behind a veneer of disinterestedness purporting to move the debate beyond culture, the quest for low transaction costs does, in fact, rotate the axis of our public conversation on account of the glorification of numbers it effectively propounds. As it instrumentalises values, economic analysis speaks to our conception of ourselves as moral beings. In the process, it significantly impoverishes us. ‘Numbers provide the comforting illusion that incommensurables can be weighted against each other, because arithmetic always “works.” Given some numbers to start with, arithmetic yields answers. Numbers force a common denominator where there is none’. ‘[N]umbers are symbols of precision, accuracy, and objectivity. They suggest mechanical selection, dictated by the nature of the objects, even though all counting involves judgment and discretion. [...]

<sup>313</sup> Indeed, the very idea of ‘legal culture’ has been the object of an economic interpretation in Ogus, A (2002) ‘The Economic Basis of Legal Culture: Networks and Monopolization’ (22) *Oxford Journal of Legal Studies* 419. While such an argument relieves us from the tedious superficiality of so-called ‘comparative-law-and-economics’, its point remains obscure other than evidencing an obsession with rationalisation in general and with cost considerations in particular. As has been helpfully underscored in an analysis of economic integration in North America in the wake of the 1993 North American Free Trade Agreement (NAFTA), ‘[c]ultural narratives do not always follow the structure of markets and incentives, which, however powerful, often fail to overcome countervailing pressures’: Schiller, D and Mosco, V (2001) ‘Integrating a Continent for a Transnational World’ in Mosco, V and Schiller, D (eds) *Continental Order?* Rowman and Littlefield at 29.

<sup>314</sup> For a persuasive development on the intricate relationship between path-dependence theory and common-law adjudication, see Hathaway, OA (2001) ‘Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System’ (86) *Iowa Law Review* 601. The quotations are at 663.

Numerals hide all the difficult choices that go into a count. And certain kinds of numbers — big ones, ones with decimal points, ones that are not multiples of ten — not only conceal the underlying choices but seemingly advertise the prowess of the measurer. To offer one of these numbers is by itself a gesture of authority'.<sup>315</sup>

There is at hand a good illustration of how pathetic economic analysis can become.<sup>316</sup> The relevant case is *Lindh v Surman*,<sup>317</sup> in which the Supreme Court of Pennsylvania held that in circumstances where a wedding ring had been offered by a man who subsequently broke the engagement (he was, in fact, doing this for the second time), the ring must be returned. As far as the Court was concerned, the particular circumstances surrounding the termination of the engagement did not matter as such. The Court, infirming its earlier practice, adopted a 'no-fault rule'. Consider the following case-note that appeared in the *Harvard Law Review*: 'Donors of engagement rings in no-fault states now have no financial disincentive to propose marriage casually. Moreover, the desire to enjoy the relational privileges of engagement may drive donors to devise schemes to reap those benefits — at no cost to themselves. Because it gives donors less incentive to take care, the [*Lindh*] rule will likely lead to an increase in broken engagements, with all their attendant emotional and economic harms. Such a result would counteract whatever policy goals a strict application of the no-fault rule advances'.<sup>318</sup> Indeed!

•

There can be no question of leaving local laws to stand in juxtaposition as so many monads, for although law is nowhere but in its inscription, it cannot be reduced to that inscription. The goal for comparatists-at-law must thus be to 're-inscribe' (or 'deconstruct') the locality of law beyond any spatio-temporal facticity (and to do so at another level than the metaphysical, whether celestial or tellurian) in order to make it amenable to cross-legal/cross-cultural/cross-traditional negotiation. Quite apart from partaking in an inexhaustible quest the outcome of which is marked by the comparatist's exhaustion (or the editor's final deadline), this process of 're-inscription' is, of course, an act of violence. But it is emphatically a 'lesser' violence than that wrought on the 'legal' by the metaphysician masquerading as comparatist-at-law and wielding the sticks of deracination and transcendentalisation (or is it panoptic control?). The alternative 'model' thus demands sensitivity to the matter of alterity without renouncing the ambition of knowledge. It must eschew the semblance of understanding that comes with the re-description of otherness-in-the-law in familiar, domestic terms, something which — under the guise of 'dialogue' — is an inadvertent invitation to the subjugation of others into a frame of reference that is actually alien to them and that can only result in the distortion of cultural meaning. A key point that must be readily appreciated is that I am not addressing this question in terms of any specific individual's idiosyncratic subjectivity — the kind of subjectivity that could be avoided

<sup>315</sup> Stone, DA (1988) *Policy Paradox and Political Reason* HarperCollins at 136-37. For a comprehensive argument along these lines, see Stein, JG (2001) *The Cult of Efficiency* Anansi, 2001.

<sup>316</sup> See Kull, A (2001) 'The Simplification of Private Law' (51) *Journal of Legal Education* 284.

<sup>317</sup> 742 A.2d 643 (Pa 1999).

<sup>318</sup> *Id* at 292. The reference is to Note (2000) 'Property Law — Pennsylvania Supreme Court Holds That Engagement Rings Must Be Returned Regardless of Who Broke the Engagement — *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999)' (113) *Harvard Law Review* 1876 at 1880-81.

if one did one's homework properly with a competent dose of fair-mindedness. The understanding into which the other is appropriated is not locked into the consciousness of an individual subject such that it would be of the appropriating individual's own making. When the interpreter comes to the other's law and purports to make sense of it, the anticipation of meaning that he brings to bear to the act of ascription is, in fact, profoundly historical and, in that sense, deeply traditional. The meanings that the interpreter brings to the act of interpretation were internalised by him as he was thrown into a tradition (linguistic, legal, and otherwise) that constituted him as the individual that he is (and as a member of the tradition). The basic point is that the individual's sphere of understanding is, in important ways, inherited and that it arises irrespective of any subjective preferences. One can, in fact, take matters one step further. Understanding does not emerge despite this historical situatedness or traditionary embeddedness, but is made possible because of it. How could any understanding happen without anticipation of meaning? And how could there be anticipation of meaning without belongingness to a tradition? This is, if you like, the work of history. But, of course, the basic question resurfaces. If history works to fashion my understanding of the world, how can I ever make sense of a law having come from 'elsewhere' (ie, from another language, another history, another set of institutions, another array of social practices) other than on perspectival terms? The problem is compounded by the fact that foreign law too partakes in a vantage point that was shaped by a history, a politics, a society, and so forth. How can foreign law, which is situated, be accessible to understanding which is itself situated, albeit within a different episteme? In other words, how can inter-traditional understanding happen? 'The great problem in [...] a hermeneutical approach [when the distance to overcome, needed for any understanding, is not just a distance within one single culture (...) or a temporal one (...), but rather the distance between two (or more) cultures, which have independently developed in different spaces (*topoi*) their own methods of philosophizing and ways of reaching intelligibility along with their proper categories] is the peculiar type of preunderstanding necessary to cross the boundaries of one's own philosophical world'.<sup>319</sup> Something like this difficulty already exists within a single culture. But in our case we have something specifically different. Here, comparatists-at-law find themselves operating under a different *mythos* or horizon of intelligibility. Even assuming that understanding is possible while one is operating within one's hermeneutic circle (that is, intra-hermeneutically), how can one ever understand something that does not belong to one's circle, how can one ever ascribe meaning to an indigenous declension of the 'legal' expressing itself *elsewhere*? The short answer, in my view, is that one simply cannot. This is a crucial idea embodied in the notion of 'incommensurability' – which wants to fight the received view that there exists a law-text that would present itself in its ontological self-sameness both to those operating locally and to those operating elsewhere, that the same law-text would come to language in different traditions and yet would somehow 'unite' traditions even as they bring the law-text to language across cultural boundaries. It is not that there is 'something' (a law-text) that the local interpreter would see in one aspect and that the foreign interpreter – let us

<sup>319</sup> See Panikkar, R (1988) 'What Is Comparative Philosophy Comparing?' in Larson, GJ and Deutsch, E (eds) *Interpreting Across Boundaries* Princeton University Press at 130. For an argument showing the limits of Gadamerian hermeneutics with specific reference to cross-cultural understanding, see Vitkin, M (1995) 'The "Fusion of Horizons": On Knowledge and Alterity' (21) *Philosophy and Social Criticism* 57.



say, the comparatist — would see in a different aspect as allowed by his own perspective. It is, rather, that there is no ‘unique’ law-text or — which is another way to put the matter — that the law-text is inherently historically and linguistically constituted in the sense that it can only exist from within a historical and linguistic perspective, from within an episteme, and that it cannot be envisaged as existing otherwise. The law-text, and the law *tout court*, cannot transcend perspective. In the words of MacIntyre, ‘[t]here is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided by some particular tradition or other’.<sup>320</sup> What is said of moral philosophy can be said of law, that is, that ‘the evaluative and normative concepts, maxims, arguments and judgments [...] are nowhere to be found except as embodied in the historical lives of particular social groups and so possessing the distinctive characteristics of historical existence: both identity and change through time, expression in institutionalized practice as well as in discourse, interaction and interrelationship with a variety of forms of activity’.<sup>321</sup> Like language, for example, which can only name in such a way, law is tied to what it names. The fact is that ‘[w]e have not got a language which will serve as a permanent neutral matrix for formulating all good explanatory hypotheses, and we have not the foggiest notion how to get one’.<sup>322</sup> And the further fact is that we have not got a neutral law either: any claim about law is made in the terms of *a* law (and of *a* language).

How far can a comparatist who has assimilated the epistemological assumptions of a legal tradition as reinforced and actively forged through a legal-cultural system of schooling within which he has been immersed come to edge understanding — in the strong sense of the term — closer to the experience of another legal culture and away from mere ventriloquism about that culture? Such is Dan Sperber’s argument: ‘your understanding of what I am saying is not a reproduction in your mind of my thoughts, but the construction of thoughts of your own which are more or less closely related to mine’.<sup>323</sup> As Laurence Thomas observes, ‘[n]o amount of imagination in the world can make it the case that one has the subjective imprimatur of the experiences and memories of another’.<sup>324</sup> In effect, ‘there is [...] *always* a remainder, much that I do not understand about the other person’s experience

<sup>320</sup> MacIntyre, *A Whose Justice? Which Rationality?* supra note 31 at 350.

<sup>321</sup> MacIntyre, *A After Virtue* supra note 46 at 265.

<sup>322</sup> Rorty, R (1979) *Philosophy and the Mirror of Nature* Princeton University Press at 348-49 [emphasis original]. For his part, Derrida claims the ‘absolute impossibility of a metalanguage’ and the ‘impossibility of an absolute metalanguage’: Derrida, J (1996) *Le monolinguisme de l’autre* Galilée at 43 [‘impossibilité absolue de métalangage’ / ‘Impossibilité d’un métalangage absolu’]. Relevant claims concerning intercultural dynamics include Clammer, J, Poirier, S and Schwimmer, E (eds) (2004) *Figured Worlds* University of Toronto Press; Cook, JW (1999) *Morality and Cultural Differences* Oxford University Press; Grillo, R (1998) *Pluralism and the Politics of Difference* Oxford University Press; Lynch, MP (1998) *Truth in Context* MIT Press; Budick, S and Iser, W (eds) (1996) *The Translatability of Cultures* Stanford University Press; Dingwaney, A and Maier, C (eds) (1995) *Between Languages and Cultures* University of Pittsburgh Press. See also Legrand, P (2005) ‘Issues in the Translatability of Law’ in Bermann, S and Wood, M (eds) *Nation, Language, and the Ethics of Translation* Princeton University Press 30.

<sup>323</sup> Sperber, D *Explaining Culture* supra note 82 at 58. This formulation reminds one of Bhabha, HK *The Location of Culture* supra note 23. Cf Beckett, S (1990) [1946] ‘The Capital of the Ruins’ in *As the Story Was Told: Uncollected and Late Prose* John Calder at 25, who refers to ‘the simple and necessary and yet so unattainable proposition that their way of being we, [is] not our way and that our way of being they, [is] not their way’.

<sup>324</sup> Thomas, L (1992) ‘Moral Deference’ (24) *Philosophical Forum* 233 at 235.

and perspective'.<sup>325</sup> Acquired knowledge, then, is always derivative or contingent,<sup>326</sup> which is why linguistics teaches that 'the phonetic boundaries of bilingual speakers are never exactly the same as those for corresponding monolinguals'; in other words, the bilingual 'never reaches the ideal goal of a new phonological norm'.<sup>327</sup> Clearly, idealising descriptions of extensive commonalities and co-operative mutualities supposedly presupposed by human communication obscure epistemological differences amongst verbal agents not least as regards the significant operation of asymmetrical relations between comparatists-as-observers and their interlocutors-as-observed. Is there then a reconstructive approach that would allow the comparatist to escape the situation in which he has always-already been thrown? The answer cannot have much to do with 'contact' — ie, with anything like 'immersion'. The hermeneutic difficulty lies elsewhere, for the issue concerns the absence of shared episteme. No quantity or intensity of contact can change anything to that dissonance: the law under scrutiny by the comparatist will continue to have been produced by a tradition that differs from the tradition having constituted the comparatist and within which he continues, perhaps unwittingly, to dwell. Both traditions still do not share an object. Is there any other strategy, then? I claim that one or two correctives can be implemented. They will not solve the problem, which to my mind is insoluble. But they will alleviate its impact. Accepting that the absence of epistemological commensurability cannot be taken to imply the lack of all referential interface (even though there can be no question of an identity of referents in terms of their extension), any movement across different frames of references must avoid any ascription of truth-in-the-law. It must also eschew any attempt at synthesis — which, as it implements the synthesiser's standard of rationality, would entail a re-statement and perhaps a misunderstanding of the other's. Indeed, any synthesis could only be achieved from within one (anticipatory) frame of reference and would lead to a partial dissolution of the other, that is, to an annexation.<sup>328</sup> Rather, a relationship to what is meant, to what is being spoken about, must be arranged in the light of the determinative-disclosive function of (non-neutral) language. This must mean keeping the interference with the activity performed by the law-text itself to the minimum. I argue that the optimal way to achieve this limited-intrusion policy is to trace the law-text to the episteme whose construct it is. Note that, in this respect, the idea is not to restore 'the' meaning of the law, but to pay attention to the constitution of the law-text, that is, to recover the range of 'things' of which the law-text speaks. Only then can the comparatist avoid the worst implications of reductionism (cabining the other's position before one can even open oneself up to his — by then — domesticated and thus distorted voice) and dogmatism (elevating one's position to measure the other's). Only then can one

<sup>325</sup> Young, IM (1997) 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought' (3) *Constellations* 340 at 354-55 [my emphasis].

<sup>326</sup> A fascinating study on the limits of acculturation is Lantolf, JP (1999) 'Second Culture Acquisition' in Hinkel, E (ed) *Culture in Second Language Teaching and Learning* Cambridge University Press 28.

<sup>327</sup> Bialystok, E and Hakuta, K (1994) *In Other Words: The Science and Psychology of Second-Language Acquisition* Basic Books at 16. See generally Ellis, R (1994) *The Study of Second Language Acquisition* Oxford University Press at 299-345.

<sup>328</sup> Cf MacIntyre, A *Three Rival Versions of Moral Enquiry* supra note 46 at 117: 'It is not that the adherent of one particular standpoint cannot on occasion understand some rival point of view both intellectually and imaginatively, in such a way and to such a degree that he or she is able to provide a presentation of it of just the kind that one of its own adherents would give. It is that even in so doing the mode of presentation will inescapably be framed within and directed by the beliefs and purposes of one's own point of view'.

eschew, to an extent at least, receptivity to the other as already-imported, as already-and-irrevocably reduced to self.<sup>329</sup> Only then is comparison *other-wise*.

Against this background, I advocate a two-step process. First, I draw on Heidegger's alternative conception of 'truth' to introduce the notion of 'unconcealment' within the comparative framework. Secondly, I detach 'unconcealment' from 'truth'. I argue that while the former must lie at the heart of any comparative practice, the latter is dispensable — and must indeed be relinquished without any qualms as a kind of pre-critical residue. Comparatists cannot have direct access to something like 'the law' since knowledge thereof is ineluctably structured by the forms of their cognitive, linguistic, and perceptual grasp. Textuality is only available through culturally-mediated structures of thought, knowledge, and re-presentation which alone make understanding possible. There is more. What is 'out there' — the statute, the case, the book — is itself culturally mediated. What is called the 'truth' of the statute, for example, is inseparable from (local) discursive structures and systems of signification. None of this, of course, ought to be taken as suggesting that reflection upon one's own procedures and upon institutional frameworks is not a necessary task, if only because any attempt at theorisation may work to produce useful change as regards assumptions and practices. But I argue that the constitutive activity of the comparatist and the nature of the comparatist's object of study combine to make the idea of 'truth', ultimately, at best superfluous and, at times, positively misleading — in short, undesirable.

## V CRITIQUE (PART ONE)

[T]here is only one that would be one too many, which would be one and one only.

Werner Hamacher<sup>330</sup>

How to restore to the singular, to the unexchangeable, to muteness, the attributes of power and, therefore, of health, of sovereignty — given that language, communication, exchange have attributed to *gregarious conformity* what is healthy, powerful, sovereign?

Pierre Klossowski<sup>331</sup>

Assuming for the moment the pursuit of 'truth' to constitute a legitimate object of intellectual inquiry for comparatists-at-law (more on this below), one must turn to one of the most influential post-Cartesian philosophical projects, which reminds us that truth-as-correctness constitutes but one conception of 'truth' — and a singularly impoverished one at that. In his work, Heidegger thus contrasts 'truth-as-correctness', which he associates

<sup>329</sup> For another approach to comparative understanding, see Lasser, M (2003) 'The Matter of Understanding' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 197.

<sup>330</sup> Hamacher, W 'One 2 Many Multiculturalisms' supra note 22 at 325.

<sup>331</sup> Klossowski, P (1969) *Nietzsche et le cercle vicieux* Mercure de France at 118 [*Comment restituer au singulier, à l'inéchangeable, au mutisme les attributs de la puissance donc de la santé, de la souveraineté — dès lors que le langage, la communication, l'échange ont attribué à la conformité grégaire ce qui est sain, puissant, souverain?*] (emphasis original).

with the Roman intellectual heritage (truth  $\cong$  *veritas*), with ‘truth-as-unconcealment’, an idea he regards as a Greek legacy (truth  $\cong$  ἀλήθεια or *aletheia*).<sup>332</sup> Let me indicate at the outset that I do not propose to enter into the ongoing debate surrounding the merits of Heidegger’s ‘aletheiology’, that is, his historical and etymological arguments drawing a connection between the Greek word for ‘truth’ and the idea of ‘uncovering’ (in Greek mythology, the river Lethe is located in the kingdom of Hades, the underworld inhabited by the spirits of the dead; if drunk, its water produces forgetfulness; Heidegger’s claim focuses on the privative character of the prefix ‘a’ in *aletheia*: according to him, the *alpha-privativum* would suggest unforgetfulness, ie, uncovering).<sup>333</sup> Suffice it to make two points in this regard. First, there appears to be general acceptance of Heidegger’s view that the idea of ‘truth-as-correctness’ is significantly indebted to Thomas Aquinas and that it is in Aquinas’s work that the *locus classicus* expressing the Romanist notion can indeed be found (*‘veritas adaequatio intellectus et rei est’*).<sup>334</sup> Secondly, there seems to be a substantial current of opinion to the effect that Heidegger’s views on the historical and etymological origins of the notion of ‘aletheia’ are unsustainable.<sup>335</sup> Be that as it may, it remains that through Heidegger ‘truth’ is envisaged in a way that differs in fundamental respects from the Romanist or Aquinian conception and that purports to overcome the static dichotomy between systematics and historicity. I argue that, assuming truth-in-the-law to matter at all (more on this below), this alternative perspective on ‘truth’ is of the first importance for comparative legal studies. In my opinion, should a conception of ‘truth’ at all govern comparative research about law (again, more below), it is this other conception of ‘truth’ that ought to prevail — that which features historicity as a central theme.<sup>336</sup> If my approach is found to be persuasive, it follows that orthodox projects of the kind fostered by Kötz, Gordley, Markesinis, and by countless others require to be fundamentally re-assessed.

Key to his world-view, Heidegger’s theory of truth is famously redoubtable.<sup>337</sup> Rather than account for it in every last detail, which would be at least as presumptuous as it would be irrelevant, I propose to re-formulate some of its salient features bearing in mind

<sup>332</sup> For Heidegger’s views on ‘truth’, see, in particular, his two essays, ‘On the Essence of Truth’ supra note 135 at 111-38 and (1977) [1960] ‘The Origin of the Work of Art’ in *Basic Writings* Krell, DF (ed) and Hofstadter, A (trans) Harper Collins at 139-212. See also id *Being and Time* supra note 138 at 256-73. A more developed (and intricate) treatment is available in id (2002) *The Essence of Truth* Sadler, T (trans) Continuum [delivered as a course of lectures in 1931-32 and published posthumously in 1988]. The theme also features prominently in id (1992) *Parmenides* Schuwer, A and Rojewicz, R (trans) Indiana University Press [delivered as a course of lectures in 1942-43 and published posthumously in 1982]. For a discussion of ‘aletheia’, see id (1975) [1954] *Early Greek Thinking* Krell, DF and Capuzzi, FA (ed) Harper and Row at 207-82. A leading commentary is Dahlstrom, DO (1994) *Heidegger’s Concept of Truth* Cambridge University Press.

<sup>333</sup> In fact, Heidegger refuses a literal translation of ‘aletheia’ as ‘truth’. In his view, ‘aletheia’ — which he renders as ‘unconcealment’ (more below) — is ‘not yet truth’: Heidegger, M (1972) ‘The End of Philosophy and the Task of Thinking’ in *On Time and Being* Stambaugh, J (ed and trans) Harper and Row at 69. For the original text, see id (1969) *Zur Sache des Denkens* Max Niemeyer at 76 [‘noch nicht Wahrheit’].

<sup>334</sup> *Summa Theologiae* supra note 137.

<sup>335</sup> See, eg, Caputo, JD (1993) *Demythologizing Heidegger* Indiana University Press at 9-38; Nwodo, CS (1979) ‘Friedländer Versus Heidegger: A-letheia Controversy’ (10) *Journal of the British Society for Phenomenology* 84. For a general observation regarding Heidegger’s language, see Löwith, K (1995) [1983-84] *Martin Heidegger and European Nihilism* Wolin, R (ed) and Steiner, G (trans) Columbia University Press at 40: ‘the connections Heidegger establishes simply cajole rather than convince and in the most favorable case are merely probable’.

<sup>336</sup> See generally Ruin, H (1994) *Enigmatic Origins: Tracing the Theme of Historicity through Heidegger’s Works* Almqvist and Wiksell.

<sup>337</sup> Truth and the question of being are thus presented as ‘the double leitmotiv of Heidegger’s thought’: Biemel, W (1973) *Heidegger* Rowohlt at 35 [‘Das doppelte Leitmotiv von Heideggers Denken’].

what I think one can reasonably regard as its pertinence to the field of comparative legal studies. For Heidegger, truth-as-correctness can only be reduced truth because it ignores a primordial issue. For there to be truth, that-of-which-truth-is-sought (let us say, the 'thing' or, better still, the 'entity') must first become manifest. The basic idea is that in order to get to the truth, the truth-seeker must first and foremost unconceal what is latent within the entity under consideration. The basic goal of the truth-seeker thus becomes the unconcealment of the entity.<sup>338</sup> In other words, the aim is to take an entity out of its hiddenness and to let it be seen in its unhiddenness, thus, to allow it to manifest itself in the world. Until this has happened, it makes no sense to assume that any proposition or any statement could ever 'truthfully' account for the entity. 'Manifestation' must come first and only when everything is out in the open, so to speak, does it make sense to talk about whether or not there is correspondence between a statement and the entity it purports to describe. Now, the idea of 'manifestation in the world' — or, if you will, the emergence of an entity into the unconcealedness of its being — assumes that the truth-seeker lets the entity be present in its current meaning in a given situation, that it allows it to reveal its whatness, its howness. This, in turn, must mean that for an entity to manifest itself in the world, the existence of the background within which the entity is inscribed — which is authoritatively constitutive of the entity itself — must be brought to light. In other words, the truth-seeker is required to anticipate something intrinsically invisible given that the entity's present being is constituted in a meaningful way by what is invisible. According to Heidegger, the meaningfulness of the background is not in doubt. For him, the hidden 'belongs to what thus shows itself, and it belongs to it so essentially as to constitute its meaning and its ground'.<sup>339</sup> Upon being anticipated, the intrinsically invisible becomes quasi-present, that is, even while remaining intrinsically absent, the invisible-as-anticipated confers being on the entity by allowing it to be seen as what it presently is. There prevails, in sum, a pattern of absence unconcealing presence. Heidegger (using his idiosyncratic formulations) summarises his argument thus: 'To say that an assertion "*is true*" signifies that it uncovers the entity as it is in itself. Such an assertion asserts, points out, "lets" the entity "be seen" in its uncoveredness. The *Being-true* (*truth*) of the assertion must be understood as *Being-uncovering*. [...] Truth (uncoveredness) is something that must always first be wrested from entities. Entities get snatched out of their hiddenness. The factual uncoveredness of anything is always, as it were, a kind of *robbery*' ('*Raub*').<sup>340</sup>

It is important to stress that unconcealment does not mean that the entity becomes other than what it was while it remained hidden, that it is somehow othered. More accurately,

<sup>338</sup> Although there is no need to elaborate on this point here, Heidegger distinguishes between *unconcealing* or *uncovering* an entity and *disclosing* its manner of being. For an introduction to this differentiation, see Dreyfus, HL (1991) *Being-in-the-World* MIT Press at 106-07. For a thorough examination of Heidegger's 'unconcealment', see Wrathall, MA (2005) 'Unconcealment' in Dreyfus, HL and Wrathall, MA (eds) *A Companion to Heidegger* Blackwell at 337-57.

<sup>339</sup> Heidegger, M *Being and Time* supra note 138 at 59. For the original text, see id *Sein und Zeit* supra note 138 at 35 ['*was (...) etwas ist, was wesentlich zu dem, was sich zunächst und zumeist zeigt, gehört, so zwar, daß es seinen Sinn und Grund ausmacht*'].

<sup>340</sup> Id at 261 and 265, respectively [emphasis original]. For the original text, see id *Sein und Zeit* supra note 138 at 218 and 222, respectively ['*Die Aussage ist wahr, bedeutet: sie entdeckt das Seiende an ihm selbst. Sie sagt aus, sie zeigt auf, sie 'läßt sehen' (...) das Seiende in seiner Entdecktheit. Wahrsein (Wahrheit) der Aussage muß verstanden werden als entdeckend-sein / 'Die Wahrheit (Entdecktheit) muß dem Seienden immer erst abgerungen werden. Das Seiende wird der Verborgenheit entrissen. Die jeweilige faktische Entdecktheit ist gleichsam immer ein Raub'*] (emphasis original).

as there occurs a dialectical move away from coveredness (*Verdecktheit*) towards uncoveredness (*Entdecktheit*), there intervenes a meaning-providing force that makes the entity visible rather than simply describes it — that brings it out as being within a world, that worldifies it (*weltet*). As the entity is let to be the entity that it is, the entity that existed becomes more existent (Heidegger refers to this more-existent as *das Seiendeseiender*). Thus, Heidegger talks about a confirmation process: “Confirmation” signifies the entity’s showing itself in its selfsameness.<sup>341</sup> In the course of his discussion, Heidegger makes the crucial point that inasmuch as truth is constituted by unconcealment it is inextricably linked to human existence. It is indeed the truth-seeker who is acting as unconcealing agent such that, without him, there can be no truth. Thus, Newton’s laws were not true before Newton since they came to be unconcealed only through him and are true only in their unconcealment.<sup>342</sup> And before there was human existence, there was no truth, which is to say that truth-as-unconcealment can only exist through the historicity of the truth-seeker. Only a truth-seeker can clear a space of intelligibility for truth’s unconcealment, only a truth-seeker can open up the field of significance for the self-showing of what is there.<sup>343</sup> Far from amounting to neglect or indifference on the part of the truth-seeker, this withdrawal (*Seinsentzug*) in the face of entities such that they may reveal themselves with respect to what and how they are means an engagement with the entity. If the truth-seeker is not prepared to surrender with humility to the entity instead of attracting attention to himself, if he is not prepared to remain in the background and thus foster a kind of openness (*Offenheit*) in which the entity can come to unconcealment, can be permitted to be present, the entity will not be allowed to show itself to be the entity that it is, to be as it is. In this case, the entity is concealed and distorted; in the words of Heidegger, it is on account of such inadequate analysis that ‘[s]emblance comes to power’.<sup>344</sup> The goal for the truth-seeker must be to ‘defend [what has already been uncovered] against semblance’.<sup>345</sup>

In order to be faithful to Heidegger’s thought, three key qualifications must be entered at this stage. First, to say that Newton’s laws were not true before Newton is not to say that they were then false. Unconcealment, contrary to truth-as-correctness, does not mark an opposition to falsehood; if anything, it rather marks an opposition to ignorance. What is as-of-yet-unconcealed cannot be said to be false and the fact that it is as-of-yet-unconcealed cannot make the entity to which it pertains false. The issue is latency, not falsehood. Secondly, to say that the truth-seeker-as-unconcealing-agent is required for there to be truth does not mean that truth in the ontic sense is relative. While the truth-seeker is the basis for the possibility of there being truth at all, he does not determine truth. Indeed, the process of unconcealment takes truth out of the province of subjective discretion.<sup>346</sup>

<sup>341</sup> Id at 261 [emphasis original]. For the original text, see id *Sein und Zeit* supra note 138 at 218 [‘Bewährung bedeutet: sich zeigen des Seienden in Selbigkeit’] (emphasis original).

<sup>342</sup> Id at 269.

<sup>343</sup> For a helpful presentation of this idea, see Mulhall, S (1996) *Heidegger and Being and Time* Routledge at 94-104.

<sup>344</sup> Heidegger, M ‘On the Essence of Truth’ supra note 135 at 127. For the original text, see id (1976) [1930] ‘Vom Wesen der Wahrheit’ in *Wegmarken*, in *Gesamtausgabe* Vittorio Klostermann at 191 [‘Der Schein kommt zur Macht’].

<sup>345</sup> Id *Being and Time* supra note 138 at 265 [emphasis original]. For the original text, see id *Sein und Zeit* supra note 138 at 222 [‘das auch schon Entdeckte gegen den Schein (...) versichern’] (emphasis original).

<sup>346</sup> Id *Being and Time* supra note 138 at 270. It does not, however, take it out of the realm of ‘fore-conception’ (*Vorgriff*) — what one could call ‘enculturation’ or ‘traditionalisation’: id at 191. For the successor idea of ‘pre-

Thirdly, for all the unconcealing that is being brought to bear on the entity, this entity does not become present fully and immediately. Rather, the entity's being is always a matter of synthesis, it is always finite such that its manifestation is always only partial and discursive: there can never be full unconcealment.<sup>347</sup> Even as he purports to make an entity intelligible, as he reveals the entity in a certain, fruitful manner, the truth-seeker necessarily and simultaneously conceals other approaches.

In sum, according to Heidegger, unconcealment is an event that happens when an entity is made intelligible as it really is without any concealment. Rather than being reduced to a mere proposition that exists separately from that-which-is-to-be-known, unconcealment finds its locus in intelligibilisation lived out in the world. In this sense, the who-is-unconcealing and the what-is-unconcealed cannot be legitimately separated. Here, action (the act of unconcealment) and knowledge (the unconcealed) are held together as a single event that captures the interdependence of being with world (in a way that overcomes the Cartesian dichotomy between the knower and the known). Having said this, it must be emphasised that Heidegger does not jettison the idea of truth-as-correctness altogether. What he is saying is that the very possibility of truth as the correspondence of a statement with the world can only arise on the basis of a prior event through which the meaning of the world is unconcealed.<sup>348</sup>

I argue that Heidegger's philosophical discriminations can be made to work for comparative legal studies — and thus that, in a compelling way, Heidegger was a comparatist *ante litteram* (even though, needless to say, the comparison of laws was not uppermost on the philosopher's mind as he penned his disquisitions in the hills of blissful

---

understanding' (*Vorverständnis*'), see Bultmann, R (1952) [1950] 'Das Problem der Hermeneutik', in *Glauben und Verstehen* vol II JCB Mohr at 211-35. See also Gadamer, H-G *Truth and Method* supra note 46 at 265-307. The excerpt that follows captures the main point: 'A person who is trying to understand a text is always projecting. [...] Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning'. The quotation is at 267. For the original text, see id (1990) *Wahrheit und Methode* (6th ed) JCB Mohr at 271 ['*Wer einen Text verstehen will, vollzieht immer ein Entwerfen. (...) (E)in erster Sinn (...) zeigt sich wiederum nur, weil man den Text schon mit gewissen Erwartungen auf einen bestimmten Sinn hin liest*']. I return to these two notions below.

<sup>347</sup> Thus, Heidegger writes that '[t]ruth is un-truth, insofar as there belongs to it the reservoir of the not-yet-revealed, the un-uncovered, in the sense of concealment': Heidegger, M 'The Origin of the Work of Art' supra note 332 at 185. For the original text, see id (1977) 'Der Ursprung des Kunstwerkes' in *Holzwege*, in *Gesamtausgabe* vol V Vittorio Klostermann at 48 ['*Die Wahrheit ist Un-Wahrheit, insofern zu ihr der Herkunftsbereich des Noch-nicht(des Un-)Entborgenen im Sinne der Verbergung gehört*'].

<sup>348</sup> In terms of Heidegger's philosophy, '[t]he traditional conception of truth as assertion is [...] "derivative"; it takes place at an ontic level — that is, one that does not capture the (ontological) difference between Being and beings. [...] Heidegger's concern is to show that propositional truth [...] is [...] limited to the "ontical" level of inquiry': Scheibler, I (2000) *Gadamer: Between Heidegger and Habermas* Rowman and Littlefield at 107. The following illustration may assist. '[I]f one says, "There is a gold coin on the table," the "truth" of the statement is dependent on the correspondence of the statement with the existence of the coin: the fact that there *is* indeed a gold coin on the table. The traditional concept of truth focuses on two elements: the assertion and the object to which the assertion points. What this orientation misses is the fact that for the assertion to point to the entity as an object, the entity must already be uncovered as an entity. The traditional conception of truth does not thematize the question of *how* what is made present by the assertion comes to correspond to the assertion that posits its existence. That is, the presence of the coin (the coin already uncovered as an entity, "coin") — to which the assertion is meant to correspond — is taken for granted. Because the presence of the coin is taken for granted, the conception of truth as assertion remains oriented to a level of inquiry focused on entities that are already present, which takes their presence for granted. This means that an explicit thematization of the process through which the coin first comes to be present is overlooked. The traditional conception of truth as assertion, then, *bypasses* the more fundamental relation, the explicit recognition of which is the difference between Being and being that Heidegger wishes to reconceive as the essence of truth': id at 105 [emphasis original].

Todtนาuberg). My reference to Heidegger does not purport to operate within a strictly ‘philosophical’ context, and I do not claim that my use of his theoretical framework is compatible with the fine points of his philosophical world-view. I am, if you will, adumbrating a quasi-Heideggerian narrative or something like ‘generically’ Heideggerian thought. The Heideggerian project is valuable to me *qua* comparatist-at-law *at a certain level*, that is, in the way in which it draws attention to ‘the enigmatic character of the everyday’ (which, when it comes to law, would include the incessant manifestation of legal discourse through such common artifacts as statutes and judicial decisions) and in the manner in which it stresses how ‘the obvious and given character of supposedly everyday objects and practices [again, think of statutes and judicial decisions, for example] conceals a great deal’.<sup>349</sup> My specific interest lies in the way in which Heidegger moves the discourse concerning ‘truth’ ‘from a focus on the propositional judgment about things to the awareness of the fact that something must first stand in the open as the primary condition for becoming the object of judgment in the first place’.<sup>350</sup>

Kötz, for example, assumes that he can pronounce on truth, on what law is correct, in advance of any unconcealment of law. He does not engage the laws and let them show themselves. He is not prepared to allow the laws to be seen as the laws that they are, that is, in all of the laws’ constitutive dimensions. He does not seek to elucidate the laws’ belongingness to history or the laws’ epistemological situatedness — their exposure to contingency — even as localism constitutes the very being of the laws (after all, statutes and appellate judicial decisions, for instance, do not exist ‘as such’, but are the result of historical configurations, political decisions, social compromises, epistemological determinations, linguistic choices, and psychological preferences; as Robert Gordon underlines, there is no reason why a legal culture should be expected to ‘depart drastically from the common stock of understanding in the surrounding culture’).<sup>351</sup> Instead of attempting to unravel the laws, to unconceal them, to create a space of intelligibility that will provide comparatists-at-law with meaningful interpretive opportunities — an exacting task, to be sure, for ‘[u]nconcealment happens only in so far as it is brought about by the work’<sup>352</sup> — Kötz chooses to overlook the fact that a statute, any statute, and a judicial decision, any judicial decision, partakes in recurrently emergent, relatively stable, institutionally reinforced social practices and discursive modalities (a certain unquestioned lexicon, a certain range of accepted interrogations and paths of reasoning, characteristic intellectual or rhetorical themes, paradigmatic assumptions, typical explanatory schemes, authorised narrative structures, received frames of reference, specific theories, a certain set of logical or conceptual moves, memories and expectations, cognitive and affective homologies, unconscious presuppositions, and so forth) acquired by the members of a community through social interaction and experienced by them as generalised tendencies and educated expectations congruent with their conception of justice.<sup>353</sup> Kötz effectively

<sup>349</sup> Faulconer, JE (2000) ‘Appropriating Heidegger’ in Faulconer, JE and Wrathall, MA (eds) *Appropriating Heidegger* Cambridge University Press at 3.

<sup>350</sup> Scheibler, I *Gadamer: Between Heidegger and Habermas* supra note 348 at 107.

<sup>351</sup> Gordon, RW (1984) ‘Critical Legal Histories’ (36) *Stanford Law Review* 57 at 90.

<sup>352</sup> Heidegger, M (2000) [1953] *An Introduction to Metaphysics* Fried, G and Polt, R (trans) Yale University Press at 204. For the original text, see id (1983) *Einführung in die Metaphysik in Gesamtausgabe* vol XL Vittorio Klostermann at 200 [‘Die Unverborgenheit geschieht nur, indem sie erwirkt wird durch das Werk’].

<sup>353</sup> I closely follow Smith, BH (1997) *Belief and Resistance* Harvard University Press at 92.



denies that the laws conceal anything of relevance to the comparatist. Instead, he elects to pull the various laws under examination out of their world and focus exclusively on the question of rightness 'in the abstract', so to speak. For example, German law becomes true in and of itself, irrespective of any local circumstances all traces of which are suppressed. In other words, Kötz asserts a discourse of worldmaking predicated on the exclusion of everything that does not fit within it. Through a kind of transcoding process, he fabricates a homogeneous master-narrative in which everything is joined together beyond undecidability in a vast programme of conceptual integration. If one were to return to Gordley and Markesinis and their predication of isomorphic connections across laws somehow productive of commonalities, one would find the same strategy being deployed: 'behind the idea, there is unity, the simultaneity of all real and possible durations, the cohesion from one end to the other of one Being'.<sup>354</sup>

But one cannot understand something unless one has a sophisticated account of what it is that one wants to understand: 'Truth is never gathered from things at hand, never from the ordinary'.<sup>355</sup> When it comes to law, for instance, 'there is nothing that is simply "there"'.<sup>356</sup> Thus, one cannot understand 'law' — Heidegger would say one cannot 'encounter' ('*begegnen*') law — as long as one is mired in a conception of law-as-rules-or-precepts and as long as one continues the time-honoured search for embeddedness-free elements which are then subjected to some sort of artificial adjudication (Kötz's 'bestness') or connected through some sort of artificial link (Kötz's functionality or Gordley's and Markesinis's commonality). Indeed, Heidegger goes so far as to relate the idea of 'truth-as-correctness' to that of 'error'.<sup>357</sup> My claim is that Kötz's positivistic approach, as it settles for the reduced truth of assertoric statements about what the law *is* or what the law *says*, eschews the understanding that must remain the goal of any hermeneutical and, therefore, comparative project. In fact, rather than 'taking an entity to task, as it were, for whatever it is as an entity — that is to say, letting everyone see it in its Being',<sup>358</sup> Kötz embraces a *dirigisme* meant to 'cover up' the phenomenon of law. The danger is that 'what has been primordially "within our grasp" may become hardened so that we can no longer grasp it':

<sup>354</sup> Merleau-Ponty, M (1964) *Le visible et l'invisible* Lefort, C (ed) Gallimard at 148 [*derrière l'idée, il y a l'unité, la simultanéité de toutes les durées réelles et possibles, la cohésion d'un bout à l'autre d'un seul Etre*].

<sup>355</sup> Heidegger, M 'The Origin of the Work of Art' supra note 332 at 196. For the original text, see id 'Der Ursprung des Kunstwerkes' supra note 347 at 59 [*Aus dem Vorhandenen und Gewöhnlichen wird die Wahrheit niemals abgelesen*].

<sup>356</sup> Gadamer, H-G (1976) [1965] *Philosophical Hermeneutics* Linge, DE (ed and trans) University of California Press at 121. For the original text, see id (1987) 'Die philosophischen Grundlagen des zwanzigsten Jahrhunderts' in *Gesammelte Werke* vol IV JCB Mohr at 15 [*es (...) gibt (nichts), was einfach da steht*].

<sup>357</sup> For the juxtaposition of truth as 'correctness' ('*Richtigkeit*') and 'error' ('*Irrtum*'), see Heidegger, M (1994) *Basic Questions of Philosophy* Rojcewicz, R and Schuwer, A (trans) Indiana University Press at 31 [delivered as a course of lectures in 1937-38 and published posthumously], where he addresses whether 'truth as correctness is an error'. For the original text, see id (1984) *Grundfragen der Philosophie in Gesamtausgabe* vol XLV Vittorio Klostermann at 31 [*der Wahrheit als Richtigkeit ein Irrtum ist*]. See also id *Being and Time* supra note 138 at 61: 'there is a possibility that [a phenomenological concept] may degenerate if communicated in the form of an assertion'. For the original text, see id *Sein und Zeit* supra note 138 at 36 [*Jeder ursprünglich geschöpfte phänomenologische Begriff und Satz steht als mitgeteilte Aussage in der Möglichkeit der Entartung*]. For a discussion of the connection between 'truth' and 'errancy' and for additional references to Heidegger's work, see Inwood, M (1999) *A Heidegger Dictionary* Blackwell at 54. For an examination of Heidegger's intellectual itinerary as regards the matter of 'truth', see Sallis, J (1995) *Double Truth* State University of New York at 57-105.

<sup>358</sup> Heidegger, M *Being and Time* supra note 138 at 70. For the original text, see id *Sein und Zeit* supra note 138 at 44 [*dem Seienden gleichsam auf den Kopf zuzusagen, was es je schon als Seiendes ist, d.h. es in seinem Sein für alle sehen lassen*].

an 'empty [understanding]' is 'passed on' as such, 'becoming a free-floating thesis'.<sup>359</sup> Kötz's reference to 'best' law is nothing short of a catastrophic catachresis; despite the stentorian tone, Kötz's conclusion as regards 'bestness' is guaranteed by no necessary logic nor by any necessary correspondence to 'the real'. All that is on offer is a value-judgment, that is, a contingent appreciation suggesting that, in relation to the economy of one's existence, certain consequences attendant upon the law at issue are valued and desired, that the law in question is 'best' *for something* (which is why it is 'best' *for someone*). The idea that Kötz's judgment would be unsituated or universally situated cannot withstand scrutiny — nor, indeed, can the idea that a law would be 'best' *as such*, that is, irrespective of contingency. Indeed, Kötz's appreciation is situated through and through, and this situatedness cannot be evaded: he simply cannot assert that law is a certain way ('best') independently of how he takes it to be. But Kötz's simplifications undermine the comparative project in at least two other basic ways.

First, this author presents himself as being open-minded, receptive to other views, tolerant of other views.<sup>360</sup> Yet, openness must mean, at the very least, an acknowledgment of what is alien and refractory to one's categories of thought, an openness to what is effectively the other-in-the-law's own realm of intelligibility. As he purports to keep legal heterogeneity at bay, to maintain legal diversity under cultural erasure, to eliminate those laws deemed inferior, as he co-opts and reinscribes the laws to suit his totalising mythology, Kötz, however, shows none of this sensitivity.<sup>361</sup> Secondly, Kötz wishes to obliterate the subject-position by reflecting himself out of his own historicity. By sealing himself off from the historical and epistemological contingencies of the laws being considered — by sealing himself off from the other's realm of intelligibility — and by sealing himself off from his own facticity, Kötz in effect wishes to replicate Descartes by making similar ontological assumptions and apprehending what he studies by framing it within a strictly logical space — there *le comparé*, here *le comparant* — all the while not realising how his being is inextricably involved with the world and with any intelligibility of the world that he might generate (the difference with Descartes being that, as far as I know, Kötz did not shut himself in a warm room in an attempt to free himself from involvement and passion).

<sup>359</sup> Id at 61. For the original text, see id *Sein und Zeit* supra note 138 at 36 ['(die) Verhärtung und Ungriffigkeit des ursprünglich "Griffigen" / 'E(s) wird in einem leeren Verständnis weitergegeben (...) und wird zur freischwebenden These'].

<sup>360</sup> Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 16: '[Comparative law] dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding'. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 14 ['(Die rechtsvergleichende Forschung ist) ein bewußtes Eindringen in die unterschiedlichen sozialen und kulturellen Einrichtungen unserer Welt unter Abbau unreflektierter nationaler Vorurteile und eine Verbesserung des internationalen Sicherstehens'].

<sup>361</sup> A measure of Kötz's ethnocentrism is on display in his chapter devoted to methodological issues. As I observed above, out of 23 references, 22 are to German authors. The other is to Kelsen: id at 32-47. Admittedly, the book was written for a German readership. But it is easy to observe that it has been circulating in English since 1969. It is worth adding that displays of 'comparative ethnocentrism' are not by any means confined to Kötz. For example, some most remarkable statements are offered in Zimmermann, R (1993) 'Der europäische Charakter des englischen Rechts' *Zeitschrift für Europäisches Privatrecht* at 4; id (1997) 'Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective' (56) *Cambridge Law Journal* 315; id (1996) 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (112) *Law Quarterly Review* 576.

As he becomes aware that conceptions of law-as-rules-or-precepts are impoverished, the comparatist is drawn to the explicatory power — to the ‘clearing’ (Heidegger’s ‘*Lichtung*’) — that enculturation and traditionalisation of law generate. He is seduced by ‘findings [that] have the structure of the hermeneutic “as” rather than the apophantic “as” of statement-making’.<sup>362</sup> He may consider an analogy with psychotherapy. He then appreciates that ‘[i]t would be naive to think that the goal of the psychoanalytic dialogue is to arrive at a “correct representation” of the patient’s mental state or of the precise sequence of events that led to his neurosis. On the contrary, its aim is to deepen, widen, enrich, and clarify his self-understanding, to allow him to see a broader range of connections, and to liberate him from pointless obsessions by making him more open toward the world. [...] The notion of truth as correct representation has no clear role to play in this process. The language of “disclosing,” “clearing,” and “lighting up” is much more appropriate here than that of “correspondence.” Successful therapy is measured by its consequences for one’s life’. He thus recalls Heidegger and remembers how ‘[i]n a similar way the field of disclosedness opened by Heidegger [...] might be detached from the issue of whether [description] corresponds to some set of facts. The description is measured not by criteria of correctness, but by criteria pertaining to its consequences for our lives. For example, does it give us a deeper and broader sense of who we are? does it enable us to assume our existence with renewed clarity and vigor? does it liberate us from obsessive and futile puzzles? does it enable us to see connections among a wide range of phenomena? does it bring us into accord with deep and more pervasive resonances of our heritage? does it offer us a richer and more illuminating vocabulary for describing and interpreting ourselves?’.<sup>363</sup>

Therefore, the comparatist-at-law wants to re-present a legal culture or a legal tradition in ways that have greater interpretive power than is offered by the habitual rule-based — or truth-as-correctness — model. He sees that as they focus on ‘the law’ and as they persist in their epigrammatic ways, comparatists have forgotten about *law*. In fact, the forgetting of law within comparative legal studies is so profound that even this forgetting is forgotten (which, I suppose, is a courteous way of saying that comparative legal studies would deny its denial of law). In their urge to get things right, correct, and true, comparatists-at-law have forgotten about laws themselves. Even if one can never get laws clear of their facticity (of their historical and epistemological moorings) one should nonetheless be clear about the facticity of those laws and take the full measure of their mode of presencing. I do not want to talk about the right way of getting at something; I would dispute the idea that there is a right way to get at something. I would deny that there is a right way to get at laws. Rather, I want to argue that there are ways that are more productive of relevant meaning than others for unconcealing laws as they are in their range of constitutive dimensions. The aim is to do justice to laws’ being, to paint a more telling picture of what laws actually are. To be sure, the world within which laws dwell (or, indeed, the world within which the comparatist-at-law himself dwells) can never be totally articulated, and there can never be indubitable evidence as to the constitutive features of a realm of intelligibility (if only because, ultimately, signs can only be signs for those who dwell in that context, for those for whom signs are apprehended as ‘equipment’, Heidegger’s ‘*Zeug*’).<sup>364</sup> Even as he accepts

<sup>362</sup> Guignon, CB (1983) *Heidegger and the Problem of Knowledge* Hackett at 248.

<sup>363</sup> Id at 250-51.

<sup>364</sup> This must mean that any purported representation is in the nature of a re-presentation. Cf Heidegger, M

that he can never become aware of the relational whole of significance, the comparatist-at-law's contrarian challenge is to thematise something that shows itself unthematically. Without the clearing opened by the understanding of laws within culture or tradition, the comparatist can never encounter *laws* at all. In effect, laws can only be the phenomenon of laws. Legal ontology can only be legal phenomenology.<sup>365</sup> This is because laws are always-already within the world, that they are always-already laws-in-the-world. Only worldliness allows for significance.

In *Was heisst Denken?*, Heidegger notes that if an aspiring cabinet-maker were to treat each piece of wood exactly the same, he could create functional pieces at the cost of sacrificing much of the wood's beauty or power. Arguably, though, each piece of wood requires a different response in order to bring out its best characteristics. The process of unconcealing requires the cabinet-maker to go into the wood, to let it be, by highlighting its peculiarities instead of cutting through them. A piece of wood, treated by a sensitive cabinet-maker, can be unconcealed in a very meaningful sense. Without that relatedness to the wood, the craft will never be anything but 'empty busywork', an occupation 'determined exclusively by business concerns'.<sup>366</sup> In the end, the matter can be put thus: what kind of cabinet-makers must comparatists-at-law aspire to be? I claim that they must want to be cabinet-makers in search of the authenticity of the wood. They owe it to themselves. They owe it to the wood.

## VI CRITIQUE (PART TWO)

What then is truth? A movable host of metaphors, metonymies, and anthropomorphisms: in short, a sum of human relations which have been poetically and rhetorically intensified, transferred, and embellished, and which, after long usage, seem to a people to be fixed, canonical, and binding. Truths are illusions which we have forgotten are illusions; they are metaphors that have become worn out and have been drained of sensuous force, coins which have lost their embossing and are now considered as metal and no longer as coins.

Nietzsche<sup>367</sup>

There is so little one can say, one says it all. All one can. And no truth in it anywhere.

Beckett<sup>368</sup>

*Being and Time* supra note 138 at 410.

<sup>365</sup> Cf id at 60.

<sup>366</sup> Id (1977) [1954] 'What Is Called Thinking?' in *Basic Writings* Krell, DF (ed) and Hofstadter, A (trans) Harper Collins at 379. For the original text, see id (1954) *Was heisst Denken?* Max Niemeyer at 50 ['leer(e) Betriebsamkeit' / 'lediglich durch das Geschäft bestimmt'].

<sup>367</sup> Nietzsche, F (1979) [1873] 'On Truth and Lies in a Nonmoral Sense' in *Philosophy and Truth* Breazale, D (ed and trans) Humanities Press International at 84. For the original text, see id (1922) 'Über Wahrheit und Lüge im aussermoralischen Sinne' in *Friedrich Nietzsche Gesammelte Werke [Musarionausgabe]* vol VI Musarion at 81 ['Was ist also Wahrheit? Ein bewegliches Heer von Metaphern, Metonymien, Anthropomorphismen, kurz eine Summe von menschlichen Relationen, die, poetisch und rhetorisch gesteigert, übertragen, geschmückt wurden, und die nach langem Gebrauche einem Volke fest, canonisch und verbindlich dünken: die Wahrheiten sind Illusionen, von denen man vergessen hat, dass sie welche sind, Metaphern, die abgenutzt und sinnlich kraftlos geworden sind, Münzen, die ihr Bild verloren haben und nun als Metall, nicht mehr als Münzen in Betracht kommen'].

<sup>368</sup> Beckett, S (1961) *Happy Days* Grove Press II at 51. The translation/re-writing from the English is Beckett's own.

Let us accept that truth is not immediately available through proposition or assertion. There is Heidegger's argument, of course. And one could adduce others (for example, the claim from 'a regress of observers of the observers': anyone purporting to judge the *adaequatio* would have to stand outside the interpreter-*interpretandum* relationship; in turn, his judgment would have to be judged by an outsider to his relationship to the interpreter-*interpretandum* relationship; and so forth *ad infinitum*).<sup>369</sup> Let us, then, discard the commitment to the ultimacy of propositional truth. Let us admit that, in Heidegger's idiom, 'uncoveredness as the supreme mode for presence, namely, as present now, is a mode of being' and that that is indeed 'the most authentic of all modes of being'.<sup>370</sup> Let us have nonpropositional unconcealment rather than a mere (inevitably descriptive) striving for correctness in order 'to wrench the articulations of intelligibility from their hiddenness in a way that does not at once disguise them'.<sup>371</sup> And let us do this in order to move beyond the disabling of comparative thought about law towards its empowerment. But do we need the idea of 'truth'? In other words, does this unconcealing strategy, this process of undiscovering, need to be pegged to 'truth-in-the-law'? I argue that such is not the case and that the notion of 'truth' is, in fact, ineffectual. Indeed, it ought to be jettisoned because it projects the myth of its presence: it is utopian and, as such, deceptive. This is where I part ways with Heidegger and his spirited refutation of scepticism.

In *Sein und Zeit*, Heidegger asserts that 'the contention that there are "eternal truths" [...] belong[s] to those residues of Christian theology within philosophical problematics which have not as yet been radically extruded'.<sup>372</sup> But, as Heidegger's English translator puts it: 'Should Heidegger [...] not reject [his own understanding of truth] as one of those residues of Christian theology that ought to be radically extruded from philosophy?'<sup>373</sup> Indeed, as he wants to deepen (and overcome) our epistemic habits of thought in imagining another truth, Heidegger is extending his participation in the regime of truth. Why Heidegger pursued the idea of 'truth' may well have to do with his unresolved negotiation with religious mysticism, Christianity, and Catholicism.<sup>374</sup> But it is not my goal to explore this matter here. Suffice it to say that, in my view, clarification of being in the most authentic sense of the term can, and must, eschew the language of 'truth' altogether. If, as Heidegger

<sup>369</sup> Bowie, A (2004) 'Gadamer and Romanticism' in Krajewski, B (ed) *Gadamer's Repercussions* University of California Press at 75.

<sup>370</sup> Dahlstrom, DO *Heidegger's Concept of Truth* supra note 332 at 221.

<sup>371</sup> Mulhall, S (2001) *Inheritance and Originality* Oxford University Press at 243.

<sup>372</sup> Heidegger, M *Being and Time* supra note 138 at 272. For the original text, see id *Sein und Zeit* supra note 138 at 229 ['Die Behauptung "ewiger Wahrheiten" (...) gehör(t) zu den längst noch nicht radikal ausgetriebenen Resten von christlicher Theologie innerhalb der philosophischen Problematik'].

<sup>373</sup> Macquarrie, J (1999) *Heidegger and Christianity* Continuum at 26.

<sup>374</sup> According to Caputo, '[t]he theological sources, analogy or presuppositions of *Being and Time* are unmistakable'. Even 'Heidegger's later writings and readings of Greek philosophy continued to be inhabited or haunted by this theological analogy, continued to be guided by crucial theological presuppositions': Caputo, JD (2000) 'People of God, People of Being: The Theological Presuppositions of Heidegger's Path of Thought' in Faulconer, JE and Wrathall, MA (eds) *Appropriating Heidegger* Cambridge University Press at 87. See also van Buren, J (2005) 'The Earliest Heidegger: A New Field of Research' in Dreyfus, HL and Wrathall, MA (eds) *A Heidegger Companion* Blackwell at 25: 'Heidegger certainly thought that he could simultaneously be both an ontological and a theological thinker'. Indeed, Heidegger himself went somewhat further: 'I am a Christian theologian'. This statement is from Heidegger, M (1990) [letter to Karl Löwith dated 19 August 1921] 'Drei Briefe Martin Heideggers an Karl Löwith' in Papenfuss, D and Pöggeler, O (eds) *Zur philosophischen Aktualität Heideggers* vol II: *Im Gespräch der Zeit* Vittorio Klostermann at 29 ['ich (bin) "christlicher Theologe"'] (emphasis original).

has it, '[i]n every case [...] interpretation is grounded in *something we have in advance* — in a *fore-having*', if the 'unveiling' is 'always done under the guidance of a point of view, which fixes that with regard to which what is understood is to be interpreted'; if '[i]n every case interpretation is grounded in *something we see in advance* — in a *fore-sight*'; if 'the interpretation has already decided for a definite way of conceiving [the entity], either with finality or with reservations; [if] it is grounded in *something we grasp in advance* — in a *fore-conception*',<sup>375</sup> how, then, can the quest for truth — whether ontically or ontologically — continue to make any sense? The Heideggerian notions of 'Vorhabe' ('fore-having'), 'Vorsicht' ('fore-sight'), and 'Vorgriff' ('fore-conception'), as they 'overlap and merge' and operate a philosophical vindication of the idea of 'prejudice' or 'prejudgment' ('Vorurteil'),<sup>376</sup> suggest that only within the pregiven sign-system within which one is framed does one understand, does one find meaning, does one experience what one apprehends as 'truth'. Of course, to say that all understanding is prejudiced in that it is circumscribed by the light that the historical situation sheds on the interpreter himself, and indeed on that which the interpreter is trying to understand, is not necessarily negative. The work of prejudice can, in fact, prove empowering.<sup>377</sup> Thus: 'We can understand a certain text as a novel, for example, because we belong to a history and culture that knows what a novel is'.<sup>378</sup> Or, one can understand Marcel Duchamp's readymades as art because one belongs to a culture that envisages art in a certain manner, that has an idea of what art is and of what art can be.<sup>379</sup> Yet, it remains that if truth and meaning are never given independently of a sign-system, they cannot be conceived as existing outside the constraints of a particular culture (or tradition) in a specific time and place. To use Heidegger against Heidegger, if there is something like 'Vorgriff', there is a historical specificity to every critical intervention (whether because it reflects institutional conditions or resists forms of institutional appropriation), and there is no sense to keeping truth as a heuristic goal.<sup>380</sup> In the words of Richard Rorty,

<sup>375</sup> Heidegger, M *Being and Time* supra note 138 at 191 [emphasis original]. For the original text, see id *Sein und Zeit* supra note 138 at 150 ['(Die Auslegung) gründet jeweils in einer Vorhabe. (...) Die Zueignung des Verstandenen, aber noch Eingehüllten vollzieht die Enthüllung immer unter der Führung einer Hinsicht, die das fixiert, im Hinblick worauf das Verstandene ausgelegt werden soll. Die Auslegung gründet jeweils in einer Vorsicht (...). (...) Wie immer — die Auslegung hat sich je schon endgültig oder vorbehaltlich für eine bestimmte Begrifflichkeit entschieden; sie gründet in einem Vorgriff'].

<sup>376</sup> Waite, G (2004) 'Radio Nietzsche' in Krajewski, B (ed) *Gadamer's Repercussions* University of California Press at 174.

<sup>377</sup> For a 'positive concept of prejudice', see Gadamer, H-G *Philosophical Hermeneutics* supra note 356 at 9 [1966]. For the original text, see id (1986) 'Die Universalität des hermeneutischen Problems' in *Gesammelte Werke* vol II JCB Mohr at 224 ['einen positiven Begriff des Vorurteils'].

<sup>378</sup> Warnke, G (2004) 'Literature, Law, and Morality' in Krajewski, B (ed) *Gadamer's Repercussions* University of California Press at 92.

<sup>379</sup> This conventionalist argument does not exclude the possibility that one can develop an idiosyncratic view of art. I readily admit that there is a basic ability to deviate from an ingrained cognitive pattern in ways that are creative. Cf Everdell, WR (1997) *The First Moderns* University of Chicago Press, where the author, focusing on the period between 1899 and 1913, illustrates the emergence of notions like recursion, radical subjectivity, multi-perspectivism, contingency, and ontological discontinuity through narratives devoted to individuals who, although socialised into a particular constellation of ideas, became able to think in a different way than the one presented to them. Examples of what Everdell regards as disjunctive thought include Freud, Husserl, Strindberg, Kandinsky, Bohr, and dozens of other such luminaries. *Adde*: Rorty, R (1989) *Contingency, Irony, and Solidarity* Cambridge University Press at 50: '[Human beings can] manipulate the tensions within their own epoch in order to produce the beginnings of the next epoch'. This, however, is '[t]he most they can do'.

<sup>380</sup> Indeed, Heidegger himself acknowledges that 'even the ontological investigation that [he] is now conducting is determined by its historical situation': Heidegger, M *The Basic Problems of Phenomenology* supra note 134 at 22. For the original text, see id *Die Grundprobleme der Phänomenologie* supra note 134 at 31 ['die ontologische

'historicity makes it hard to see how ontological knowledge can be more than knowledge of a particular historical position'.<sup>381</sup> 'Truth' is but evidence of an onto-theological construct in search of transcendentalism — whether celestial or tellurian. It is, ultimately, an attempt to confine contingency — and creativity — within set limits.

I feel that I can make a similar point with respect to Hans-Georg Gadamer, Heidegger's disciple and one of the most considerable 20th-century philosophers in his own right. If there is something like a 'history of effects' (*Wirkungsgeschichte*) being 'refracted through language' such that '[t]here are no contexts of human understanding that are not constituted in terms of some linguistic framework and [that] when we understand the world, ourselves, or others, we do so in terms of that framework',<sup>382</sup> if it is only through a thematic, foregoing, and sustained history-through-language 'horizon' (*Horizont*) that any understanding can be sustained; if what is encountered is always encountered through an act of making present, which itself is ensconced in that history-through-language in which I dwell; if '[i]n fact history does not belong to us [but] we belong to it';<sup>383</sup> if, in other words, understanding is always fallible since it is always happening through my prejudices or my pre-understanding (*Vorverständnis*), there is little sense in talking about 'truth' or about tradition's 'truth claim' (*Wahrheitsanspruch*).<sup>384</sup> To say, as does Gadamer, that 'truth' is ultimately guaranteed by 'a discipline of questioning and inquiring' or to assert that 'historicity' (*Geschichtlichkeit*) represents 'a positive condition to the knowledge of truth' or to speak of the 'truth of the word' is a contradiction in terms.<sup>385</sup> As has been observed, 'there remains a problem with the gap between historicity and truth. On the one hand, Gadamer emphasises the historical aspect of understanding. [...] On the other hand, [he] does not give up the idea of truth'.<sup>386</sup> Gadamer's conception of 'truth' is indeed said to have been framed 'in Heideggerian terms'<sup>387</sup> — and, as I have argued, Heidegger's reflection on this question appears at once as an 'extreme consequence of historicism' and as 'nonhistoriological thinking'.<sup>388</sup> It seems to me that Gadamer, like his mentor, is ultimately unable to escape his entanglement in metaphysics: one simply cannot be advocating that '[r]eason exists for us only in concrete, historical terms — ie, [that] it is not its own master but remains constantly dependent on the given circumstances in which it operates' and yet be militating for the pursuit of 'truth'.<sup>389</sup>

---

*Untersuchung, die wir jetzt vollziehen, ist durch ihre geschichtliche Lage bestimmt*'].  
<sup>381</sup> Rorty, R (1991) *Essays on Heidegger and Others* Cambridge University Press at 40.

<sup>382</sup> Wachterhauser, B (2002) 'Getting it Right: Relativism, Realism and Truth' in Dostal, R (ed) *The Cambridge Companion to Gadamer* Cambridge University Press at 66.

<sup>383</sup> Gadamer, H-G *Truth and Method* supra note 46 at 276. For the original text, see id *Wahrheit und Methode* supra note 346 at 281 ['*In Wahrheit gehört die Geschichte nicht uns, sondern wir gehören ihr*'].

<sup>384</sup> Gadamer, H-G *Truth and Method* supra note 46 at 362.

<sup>385</sup> Respectively: id at 491; id (1986) [1968] 'Klassische und philosophische Hermeneutik' in *Gesammelte Werke* vol II JCB Mohr at 103 [*eine positive Bedingung für die Erkenntnis der Wahrheit*']; id *Truth and Method* supra note 46 at 439. For useful (if brief) comments regarding Gadamer on 'truth', see Palmer, RE (2001) 'Introduction' in *Gadamer in Conversation* Palmer, RE (ed and trans) Yale University Press at 11-12. See generally DiCenso, J (1990) *Hermeneutics and the Disclosure of Truth* University Press of Virginia.

<sup>386</sup> Kertscher, J (2002) "'We Understand Differently, If We Understand at All": Gadamer's Ontology of Language Reconsidered' in Malpas, J, Arnschwald, U and Kertscher, J (eds) *Gadamer's Century* MIT Press at 148.

<sup>387</sup> Id at 149.

<sup>388</sup> Löwith, K *Martin Heidegger and European Nihilism* supra note 335 at 93.

<sup>389</sup> Gadamer, H-G *Truth and Method* supra note 46 at 276. For the original text, see id *Wahrheit und Methode* supra note 346 at 280-81 [*Vernunft ist für uns nur als reale geschichtliche, d.h. schlechthin: sie ist nicht ihrer selbst Herr, sondern bleibt stets auf die Gegebenheiten angewiesen, an denen sie sich betätigt*'].

Both Heidegger's '*Vorgriff*' and Gadamer's '*Vorverständnis*' strike a familiar chord with contemporary anthropologists and sociologists to the extent, at least, that they subvert the priority of subjectivity, that they show how the subject is in important ways produced outside itself.<sup>390</sup> As one knows — and as any number of cultural theorists would readily remind one — 'any culture establishes its prohibitions, its frames, its norms, its violence'.<sup>391</sup> Indeed, Jacques Derrida refers to 'the colonial structure of every culture' and mentions the 'terror' wrought by culture, whether 'soft, discreet, or screaming'.<sup>392</sup> In the words of John Caputo, 'tradition is largely the story of the winners while the dissenters have been excommunicated, torched, castrated, exiled, or imprisoned'.<sup>393</sup> Such significant constraints — to write like Heidegger, one could refer to the constellation of fore-constraints or *Vorzwänge* — suggest that '[a]ll cognition is recognition, and recognition is ultimately self-recognition, albeit through the mediation of something other than the self'.<sup>394</sup> Although, as Gadamer has it, 'all understanding is self-understanding',<sup>395</sup> it remains that the interpreter is not transparent to himself in the sense that his meanings are inextricably bound up with the meanings that constitute the world he encounters (which themselves exceed what he knows of himself) and, therefore, that in the final analysis, his 'understanding belongs to the being of that which is understood'.<sup>396</sup> At most, then, one could say, like Michel Foucault, "by truth" I do not mean the ensemble of truths which are to be discovered and accepted but rather the ensemble of rules according to which the true and the false are separated'<sup>397</sup> — a view that prompts the argument that 'error can only arise and be decided within a defined practice'.<sup>398</sup> But if there is no truth outside discourse, as Foucault is intimating, if, as he observes, 'truth' arises from a 'primary falsification that is always renewed',<sup>399</sup> it

<sup>390</sup> See, eg, Heidegger, M *Being and Time* supra note 138 at 435, who, explaining the notion of 'thrownness' ('*Geworfenheit*') — one is thrown into a lifeworld in a given place and at a given time in which certain possibilities are open to one and in which others are not —, talks about the self 'ha[ving] been submitted to a "world"', as '[being] lost in the "they"'. For the original text, see id *Sein und Zeit* supra note 138 at 383 [*angewiesen auf eine "Welt" / 'in das Man verloren'*]. See also Gadamer, H-G *Truth and Method* supra note 46 at 290: '*Understanding is to be thought of less as a subjective act than as participating in an event of tradition*' [emphasis original]. For the original text, see id *Wahrheit und Methode* supra note 346 at 295 [*Das Verstehen ist selber nicht so sehr als eine Handlung der Subjektivität zu denken, sondern als Einrücken in ein Überlieferungsgeschehen*] (emphasis original).

<sup>391</sup> Grondin, J (2003) *Le tournant herméneutique de la phénoménologie* Presses Universitaires de France at 111 [*(t)oute culture dresse ses interdits, ses cadres, ses normes, sa violence*].

<sup>392</sup> Derrida, J *Le monolinguisme de l'autre* supra note 322 at 69, 45 and 45, respectively [*la structure coloniale de toute culture / 'terreur' / 'douce, discrète ou criante*].

<sup>393</sup> Caputo, JD (1989) 'Gadamer's Closet Essentialism: A Derridean Critique' in Michelfelder, DP and Palmer, RE (eds) *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* State University of New York Press at 264.

<sup>394</sup> Kelly, M (2004) 'A Critique of Gadamer's Aesthetics' in Krajewski, B (ed) *Gadamer's Repercussions* University of California Press at 108. Gadamer emphasises this point: 'All self-knowledge arises from what is historically pregiven': *Truth and Method* supra note 46 at 302. For the original text, see id *Wahrheit und Methode* supra note 346 at 307 [*Alles Sichwissen erhebt sich aus geschichtlicher Vorgegebenheit*].

<sup>395</sup> Gadamer, H-G *Philosophical Hermeneutics* supra note 356 at 55 [emphasis original] (1961). For the original text, see id (1986) 'Zur Problematik des Selbstverständnisses' in *Gesammelte Werke* vol II JCB Mohr at 130 [*Alles verstehen ist am Ende Sichverstehen*].

<sup>396</sup> Id *Truth and Method* supra note 46 at xxxi [written as a foreword to the 2nd German edition published in 1965]. For the original text, see id (1986) 'Vorwort zur 2. Auflage' in *Gesammelte Werke* vol II JCB Mohr at 441 [*Verstehen (...) (gehört) zum Sein dessen (...), was verstanden wird*].

<sup>397</sup> Foucault, M (1980) 'Truth and Power' in *Power/Knowledge: Selected Interviews and Other Writings (1972-1977)* Gordon, C (ed) Pantheon at 132. For a reflection on discursivity, see Foucault, M (1969) *L'archéologie du savoir* Gallimard at 166-68.

<sup>398</sup> Foucault, M (1971) *L'ordre du discours* Gallimard at 35 [*l'erreur ne peut surgir et être décidée qu'à l'intérieur d'une pratique définie*].

<sup>399</sup> Foucault, M (1994) [1971] 'La volonté de savoir' in *Dits et écrits, 1954-1988* vol II Defert, D and Ewald, F (eds)



hardly pays to be speaking of 'truth' at all. How can it make sense for comparatists-at-law to approach the matter of understanding in terms of 'truth-in-the-law' as a regulative idea from the moment one accepts that there is no way of getting behind our language, our pre-conceptions, and our selves — consider Beckett: 'I'm in words, made of words'<sup>400</sup> — such that scholarly inquiry, for instance, far from being concerned with neutral or objective knowledge, can only be making *claims* to knowledge, which are inevitably partial, affected as they are by interest or power? Even if one can hope for a degree of adequacy, the meaning of truth is persistently deferred: it can neither be discovered nor found. It is in the nature of a metaphysical superstition. To those who argue in favour of the value of truth-as-aspiration, I say: what is the point of organising one's scholarly investigation around a goal that is known to be unattainable and that no one, in any event, could recognise had been attained? It would be more honest to take the matter out of the truth game entirely. My argument is not that the pursuit of knowledge is somehow unworthy. I emphatically deny this brand of cynicism. Again, my contention is not even that things cannot be known. My point is rather that, because of the situatedness of knowledge things are known under cover of 'truth' in ways that carry significant political costs. To assume that human thought is capable of transcending its historical limitation or of grasping something trans-historical, to suppose the objectivity of one's understanding, for example, 'allow[s] [one's] prejudices to prevail without constraints': 'We make the text into an object for our own use because we assume that we have no interest in it and that its meaning has nothing to do with us. In so doing, we mistake our prejudices about the text for the object we take the text to be'.<sup>401</sup> In effect, though, "'objectivity'" is culturally constituted. It is always a distinctive ontology'.<sup>402</sup>

Indeed, I argue that the idea of 'truth' must also be resisted as a matter of politics insofar as for there to be 'truth' a number of constitutive and necessary selection and exclusion mechanisms — so many applications of political decisionism — have to become operational. But these are arbitrary in the sense that 'what is could be otherwise'.<sup>403</sup> In my view, the abandonment of 'truth' is thus required for ethical reasons: the interpreter must make discursive room for the other to exist not simply as a magnanimous gesture of inclusion, but as the manifestation of a specifically ethical attitude displaying respect for otherness and recognition of otherness. The goal becomes 'an anamnesis of the all-other'.<sup>404</sup> It is, as Derrida notes, 'the most difficult thing'.<sup>405</sup>

---

Gallimard at 243 [*'une falsification première toujours reconduite'*].

<sup>400</sup> Beckett, S (1994) [1959] *The Unnamable in The Beckett Trilogy* John Calder at 390. The translation/re-writing from the French is Beckett's own.

<sup>401</sup> Warnke, G 'Literature, Law, and Morality' supra note 378 at 93-94.

<sup>402</sup> Sahlin, M (1995) *How 'Natives' Think* University of Chicago Press at 169. For a scathing indictment of 'objectivity', see LaCapra, D *History in Transit* supra note 90 at 233.

<sup>403</sup> Veyne, P (1978) 'Foucault révolutionne l'histoire' in *Comment on écrit l'histoire* Le Seuil at 204 [*'ce qui est pourrait être autre'*].

<sup>404</sup> Derrida, J *Le monolinguisme de l'autre* supra note 322 at 117 [*'une anamnèse du tout autre'*].

<sup>405</sup> Ibid [*'C'est la chose la plus difficile'*]. Cf Readings, B *The University in Ruins* supra note 89 at 162, who observes that 'respect' is a matter of 'alertness to otherness', 'something that the German word *Achtung* conveys, linking as it does respect and warning. 'Achtung! Ein andere' is perhaps the (post-Kantian) rule of this ethics'.

## VII WORKING TOWARDS ANOTHER 'MODEL'

You and your landscapes! Tell me about the worms!

Beckett<sup>406</sup>

It is *because* of thought that *non-truth* exists.

Nietzsche<sup>407</sup>

By way of (ampliative) conclusion, I claim that the following, then, holds.

- i In asserting that law is culture, one is not claiming that cultural meaning finds itself translated transparently into legal doctrine. For one thing, it is rendered in forms suitable for legal administration. Thus, courts deploy cultural understandings in order to serve the pragmatic horizon of the law, which means that their interpretations of these understandings are always shaped by the specific needs and purposes of the legal 'system'. Nor is the assumption that a law-text can only be 'redeemed' in terms of its cultural politics and that once this has been done there is nothing useful left to say. Such deterministic thinking would make for bleak culturalism indeed.
- ii The question is not whether difference across laws exists: *it does*. The issue is rather what to make of it, 'and the answer often lies in the conscious or unconscious decision to pay no attention to [culture]', that is, in the articulated or unarticulated prejudice against cultural explanation, envisaged as decorative at best.<sup>408</sup>
- iii The comparatist-at-law must be faithful to the text — especially to the *foreign* text — inasmuch as there is something like 'the law of the other text, its injunction, its signature'.<sup>409</sup> Indeed, this fidelity is 'almost sacred'.<sup>410</sup> (It is *almost* sacred, which means that there remains a space of interpretive latitude allowing a reading to *open* the text.)

(Fidelity is not only owed to the foreign, of course. Consider the son, the daughter, the friend, to whom fidelity is compellingly due. But the foreign — that which is *not* the self, *not* the familiar, *not* the domestic, *not* one's language, *not* one's nation, *not* one's country, or *not* one's law, that, in sum, which is to be found in the *not*-belonging or in the beyond-

<sup>406</sup> Beckett, S (1954) *Waiting for Godot* Grove Press II at 67. The translation/re-writing from the French is Beckett's own.

<sup>407</sup> Nietzsche, F (1926) *Der Wille zur Macht* [III-IV] in *Friedrich Nietzsche Gesammelte Werke [Musarionausgabe]* vol XIX Musarion III, § 574 at 67 ['*Erst vermöge des Denkens gibt es Unwahrheit*'] (emphasis original).

<sup>408</sup> Scharfstein, B-A (1988) 'The Contextual Fallacy' in Larson, GJ and Deutsch, E (eds) *Interpreting Across Boundaries* Princeton University Press at 86.

<sup>409</sup> Derrida, J (1998) 'Fidélité à plus d'un' (13) *Cahiers Intersignes* 221 at 262 [*la loi de l'autre texte, (...) son injonction, (...) sa signature*].

<sup>410</sup> Id at 263 ('*quasiment sacrée*').

belonging<sup>411</sup> — makes especial claims on one: it calls for an original epistemological stance in acknowledgment of the plain (yet immensely complex) fact that some others are more others than others. The encounter with the foreign generates, if you will, the kind of heightened or exacerbated duty of fidelity that arises on account of the *diffidence* that must, as an enactment of the dynamics of hospitality, accompany any coming-into-the-presence of a different and discontinuous horizon (which is also a horizon-in-time) than the one in which one's *oikos* is to be found. Analogically, the poetry of Char in French or of Celan in German creates an interpretive situation for the Anglophone reader that challenges him in a manner that differs from, say, the way in which Blake's poetry does. This is not to say that Blake's verse allows the Anglophone reader to eschew the act of translation and the accompanying duty of fidelity that arise even within his language. But the French and German texts, as they belong to different linguistic horizons, raise the fidelity 'threshold' inasmuch as they compel the Anglophone reader to make sense of a language-world that lies at a *distance*, that is not geographically/historically congruent with the space he occupies, in which he is then not 'at home'. Though allowing that any 'place' is constantly in motion, that it incessantly reconfigures itself such that any idea of 'distance' is inherently fluid, distance (even if only metaphorical in the sense of reflecting the state of being/feeling apart rather than actual space) remains key.<sup>412</sup> Does one not behave more diffidently as a guest in someone else's home than one does in one's own home? Does this greater diffidence not arise by virtue of the very fact that one is no longer *chez soi* such that, as is characteristically the case with any relationship of hospitality, one relinquishes authority and confidence — one is no longer *entitled*? Hypothetically, the greater the distance, the greater the diffidence that would be indicated. Would there not thus be more diffidence required towards the host that the guest hardly knows? This demand would have something to do with the risk of annexation being increased, with the danger that, as distance augments, the self is at greater risk of mischaracterising — and, then, of appropriating — what it is that he is encountering. Fidelity thus would act as a safeguard, saving the encountered from instrumentalisation and, indeed, the would-be instrumentaliser from himself. In sum, the less familiarity at play, the greater the risk of assimilation and the greater the risk of assimilation, the more imperative the duty of fidelity. )

iv 'Pierre' is not 'Peter'.<sup>413</sup>

v There are no strictly jaculatory utterances, not even 'legal' utterances.

<sup>411</sup> Needless to say, each and every one of these and similar terms is haunted by foreignness. Thus, Blanchot observes that 'even within the greatest familiarity', there lies 'an infinite distance': Blanchot, M (1971) *L'amitié* Gallimard at 328 [*même dans la plus grande familiarité* / '*la distance infinie*']. Within the self, for example, there is what one does not want to acknowledge about oneself or what one does not want one's self to be, there is what will be repressed as being foreign to one's idea of self. For an influential reflection on how the self is inhabited by the foreign, see Kristeva, J (1988) *Etrangers à nous-mêmes* Fayard.

<sup>412</sup> For a stimulating range of reflections on the matter of 'space', see Crang, M and Thrift, N (eds) (2000) *Thinking Space* Routledge. For an intriguing argument on spatiality with specific reference to comparative legal studies, see Stramignoni, I (2004) 'Francesco's Devilish Venus: Notations on the Matter of Legal Space' (41) *California Western Law Review* 147. See generally Saunders, R (ed) (2003) *The Concept of the Foreign* Lexington.

<sup>413</sup> Derrida, J (1998) *Psyché* (2nd ed) Galilée at 209.

- vi The preeminent manner in which laws come to be present, come to be actualised, cannot exclude discursivity, which itself is always-already situated.
- vii The words that are present in the law-text must not be privileged over the words that are absent from it.
- viii There is no knowledge that is distinct from the world.
- ix Before comparative legal studies can begin, something else — such as socialisation into a law-world — is always needed. Thus is comparison never a commencement and thus is the comparatist-at-law always situated. No comparatist is omniscient. There is no comparison from nowhere.
- x Even if a *mentalité* emerges against a background of non-mental coping (let us say, the ‘unconscious’), it is ensconced in a culture and in a tradition to the extent that the culture and the tradition will guide even what one chooses to interpret and the questions one elects to ask about the law-text.
- xi Elucidation of meaning is invention of meaning.
- xii The comparative investigation must operate a dislodgement of the ‘rule-grid’ stripped of any cultural density and at a safe distance from the pulse of life, which remains so deeply imprinted within the cloistral world of lawyers. Not only must comparative research rest on geographical deterritorialisation, but it must also engage a deterritorialisation of the legal mind. Allowing for institutional pragmatism, it must be reconfigured in a way that articulates concerns and strategies that have been disjoined through the disciplinarianisation of knowledge. For example, it must bring together the historian’s archival work, the anthropologist’s ethnographic research, the philosopher’s close reading, and the sociologist’s critical theory.<sup>414</sup> Again, the point is one about the conditions of knowledge production within comparative legal studies rather than about the generation of positivistic information. The concern is with *emergence* of meaning. In other words, the preoccupation is with making explicit *alterior* background assumptions and opening them to comparative/critical examination without abusing interpretive power, that is, without disempowering or instrumentalising the other-in-the-law that is the focus of one’s study.

<sup>414</sup> I draw on LaCapra, D *History in Transit* supra note 90 at 242.

- xiii To the extent that this interdisciplinary programme fosters anxiety for the comparatist-at-law, this must be welcomed as providing opportunities for self-questioning.<sup>415</sup>
- xiv Information is temporal and contingent. To argue that something like ‘truth-in-the-law’ exists suggests that there is something objective about the law, something that, as it presents itself to them, all comparatists-at-law everywhere are *forced* to acknowledge. This idea is rooted in an unexamined understanding of objectivity. It partakes in myth. In effect, there is ‘no rigorous argumentation that is not obedience to our own convictions’.<sup>416</sup>
- xv There cannot be a ‘better’ law. The very notion is fallacious. Who could finally and definitively say what it is? What, for example, is there about the German law on offer which, independently of Kötz’s statement about it, could possibly make Kötz’s statement concerning the truth-value of German law true? And even if there was something like ‘truth-in-the-law’, how could any comparatist ever limn it? There can only be a situated understanding of law, which is law that is in any event situated. No understanding — no matter the extent of mimetic fealty — will capture the law ‘as it is’. One may try, but one will fail for the simple reason that there is no ‘as-it-iness’ of law: any law is ontologically indeterminate such that there is nothing in the nature of a ‘noumenon’, a law-in-itself that the array of interpretations would be interpretations ‘of’. Because what goes under the name of ‘truth-in-the-law’ is manufactured or produced in discourse (as a function of power), it has no mimetic value or relational quality with respect to something that would be ‘the law’. It is, then, pointless to regard any statement-in-the-law as truth-indicative no matter how participants within a law’s practices may view their acquisition of knowledge as a matter of unprejudiced discernment. The word ‘truth’ poses the question and stands in the way of any undisputable answer. Here, one does well to go back to Gadamer: it is enough to say that ‘one understands *differently, when one understands at all*’.<sup>417</sup>
- xvi Being inevitably, if unavowedly, perspectival, the meaning of ‘better’ law is always deferred.
- xvii One does not need a goal like ‘truth’ — whether cast in celestial or tellurian terms — to set one onto one’s investigative paths. There is no

<sup>415</sup> For provocative musings on the interaction between legal and anthropological discourses at the interface of ‘human rights’ and ‘culture’, see Riles, A (2006) ‘Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage’ (108) *American Anthropologist* 52.

<sup>416</sup> Rorty, R ‘The Fate of Philosophy’ (18 October 1982) *The New Republic* at 28.

<sup>417</sup> Gadamer, H-G *Truth and Method* supra note 46 at 297 [emphasis original]. For the original text, see id *Wahrheit und Methode* supra note 346 at 302 [*man anders versteht, wenn man überhaupt versteht*] (emphasis original).

point in remaining in its thrall. To be a knowing agent is *not* to aim for truth-in-the-law.<sup>418</sup>

- xviii As he conceptualises the law in terms of ‘truth’, Kötz contradicts himself; he reintroduces the historical element that he had sought to eradicate on account of his positivism. (But he does not see this because of his misapprehension of ‘truth’, which he regards as ahistorical.)
- xix The only sense in which there will be a ‘better’ law is in the way some interpretations favouring one particular law will prove more convincing than others within the community of inquirers to which they are addressed. I hope — and this is the gist of the agenda that I wish/need to promote — that this greater persuasiveness will be a function of greater sensitivity to specificity, to the law’s own local circumstances, such that what understanding there is on offer increases the meaning of experience (both as regards the laws contemplated and with respect to the comparatist himself).

In my view, one must circumscribe an intellectual agenda for a pluralistic (rather than a totalising and therefore totalitarian) comparative legal studies aiming for heightened authenticity (both in terms of acknowledging what law is effectively like and what comparatists effectively do). There is nothing in what I have said that argues the case for any form of quietude or abdication or that suggests that comparatists-at-law will find themselves mired in self-absorption or frozen in quandaries. For the comparatist-at-law to acknowledge the contingent character of laws (whether the law into which he was socialised or any other law), to accept that any law’s values have to do with time and space, to accede to the cultural inscription of law, is emphatically not to entail a spectatorial attitude of the ‘anything goes’ ilk. Once again, my argument is a negative one as I am not arguing that all standpoints are equally meritorious, but rather that no standpoint can claim objective status.<sup>419</sup> Now, ‘a belief can still regulate action, can still be thought worth dying for, among people who are quite aware that this belief is caused by nothing deeper than contingent historical circumstance’.<sup>420</sup> Knowledge by one that one is not acting on the basis of any objective ground does not prevent one from acting. Because the adventitious or circumstantial character of law-claims does not mean that they are somehow inscribed once and for all in static structures or enclosed systems, law-claims, though ineliminably inscribed, are contaminable, deconstructible, and, ultimately, destructible. There is, then, a politics of immanence that comparatists-at-law practice with a view to get individuals-in-the-law to think differently about what they think and about what they take for granted — a

<sup>418</sup> Cf Patterson, D (1996) *Law and Truth* Oxford University Press, who argues for a reserved approach to ‘truth’ while ultimately wishing to salvage the idea.

<sup>419</sup> For a formulation of this argument, see Adorno, T *Negative Dialectics* supra note 111 at 35-36, who distinguishes between ‘the general denial of a principle [and] the denial’s own elevation to affirmative rank’. For the original text, see id *Negative Dialektik* supra note 112 at 46 [‘die allgemeine Negation eines Prinzips mit ihrer eigenen Erhebung zur Affirmation’].

<sup>420</sup> Rorty, R *Contingency, Irony, and Solidarity* supra note 379 at 189.

commitment to a rhetorics of persuasion hardly constituting an inconsequential strategy.<sup>421</sup> Operating at the level of immanence, and coming to the matter from their own immanence, comparatists-at-law get to challenge this *acquis*. What could be a more desirable political goal whether for law or for society? What could be a more challenging goal? Who could say that comparatists-at-law aspire to tranquillity?<sup>422</sup>

Complementary and supplementary points arise.

- ‘There is [...] no form of [legal] enquiry [...] which is not practical in its implications, just as there is no [legal] enquiry which is not philosophical in its presuppositions’.<sup>423</sup>
- ‘[T]he patronising dogmas of the truth [...] [must] give way to critical theories of the particular’.<sup>424</sup>
- In their cosmogenic, messianic drive, Kötz *et al* remain Platonists. One must move beyond Platonism and its essences, dualisms, and certainties.
- One must accept that the Platonic question — that of the ‘better’ law — is inherently uninteresting.
- One must also move beyond Descartes and Kant.
- One must move to Hegel (in his non-metaphysical guise), to Kierkegaard (in his non-religious guise), to Nietzsche (in his non-authoritarian guise), to Heidegger (in his non-systematic guise), to Gadamer (in his non-conservative guise), to Levinas (in his non-mystical guise), to Foucault (in his non-dogmatic guise), and to Derrida (in his non-lyrical guise).
- I advocate a comparative practice ‘in which no one [...] believes that we have, deep down inside us, a criterion for telling when we are in touch with reality or not, when we are in the Truth’.<sup>425</sup>

<sup>421</sup> In this regard, it is helpful to indicate that the self-interpellation that claims to speak for oneself only, that attempts to leave space for others, must not ‘discourag[e] us from [...] engaging the problem of thinking and feeling ourselves into the position of the other’: Simpson, D (2002) *Situatedness* Duke University Press at 43.

<sup>422</sup> Because this is a *serious* task which it behoves the comparatist-at-law to approach *seriously*, I cannot countenance Rorty’s use of the term ‘ironist’ to name the person who ‘spends her time worrying about the possibility that she has been initiated into the wrong tribe, taught to play the wrong language game’, who ‘worries that the process of socialization which turned her into a human being by giving her a language may have given her the wrong language, and so turned her into the wrong kind of human being’, who ‘cannot give a criterion of wrongness’ such that ‘the more she is driven to articulate her situation in philosophical terms, the more she reminds herself of her rootlessness’: Rorty, R *Contingency, Irony, and Solidarity* supra note 379 at 75. To my mind, ‘ironist’, as it connotes mockery, humour, and sarcasm, is simply not the apt word to describe an antifoundationalist. Let an ironist be someone who irons!

<sup>423</sup> MacIntyre, A *Three Rival Versions of Moral Enquiry* supra note 46 at 128. The transposition of this statement about moral philosophy to law is mine.

<sup>424</sup> Goodrich, P (1990) *Languages of Law* Weidenfeld and Nicolson at 1-2.

<sup>425</sup> Rorty, R ‘The Fate of Philosophy’ supra note 416 at 31.

- Such practice would feature ‘specialists in seeing how things h[a]ng together. But these would be people who had no special “problems” to solve, nor any special “method” to apply, abided by no disciplinary standards’.<sup>426</sup>
- Not unlike the ‘literature of the unword’ Beckett demanded, comparatists-at-law must require a comparison of the unrule.<sup>427</sup>
- Only after years of bad posture have been unlearned can one begin to learn ballet. Only after Kötz, Gordley, Markesinis, and their epigones have been unlearning their epistemic violence can their comparative thought develop. ‘Wakefulness’ (*Wachheit*) is in order.<sup>428</sup> Kötz and others must work critically through their beliefs, prejudices, and assumptions — all accidental historical and cultural factors that have constraining although not deterministic significance for the comparatist — with a view to understanding how they arose and became naturalised. In other words, they must historicise themselves. Only after their self-regarding ways of experiencing alterity have been probed and the ‘God’s eye view’ arising to adjudicate the grounds (or lack thereof) of all claims to knowledge outside all concrete and local practices has made way for the field comparatist trying to offer a sensible, deep, and rich account of the legal environment under observation by his best lights — only after ‘truth-in-the-law’ has made way for ‘Kötz’s truth’ (the inevitable invasion of the other into the selfsame) and only after the procedures accounting for the production of ‘Kötz’s truth’ through the enabling power he holds (or is seen to hold) within the field of comparative legal studies have been ethnographically elucidated — can comparative investigations show themselves to be hermeneutically responsive to the law’s alterity and turn to the specific circumstances of the enunciation of laws (the law requires to be historicised also; no, there are no ahistorical notions of human rights!). Again, to adopt and adapt a passage from Heidegger: ‘And our task: to bring this [alterity] into view, have a look at it, and understand it in such a manner that in it itself basic characteristics of its being are able to be brought into relief’.<sup>429</sup>

<sup>426</sup> Id at 32. But cf Zweigert, K and Kötz, H *An Introduction to Comparative Law* supra note 117 at 34: ‘The basic methodological principle of all comparative law is that of *functionality*. [...] The question to which any comparative study is devoted must be posed in purely functional terms’ [emphasis original]. For the original text, see id *Einführung in die Rechtsvergleichung* supra note 117 at 33 [‘Das methodische Grundprinzip der gesamten Rechtsvergleichung (...) ist das der Funktionalität. (...) Die Ausgangsfrage jeder rechtsvergleichenden Arbeit muß deshalb rein funktional gestellt (...) werden’] (emphasis original).

<sup>427</sup> Beckett, S (1984) [1937] *Disjecta* Grove Press at 54. Beckett’s words are in fact written in German: ‘Literatur des Unworts’.

<sup>428</sup> Heidegger connects the idea of ‘wakefulness’ to that of ‘primordial *self-interpretation*’: Heidegger, M (1999) *Ontology — The Hermeneutics of Facticity* Van Buren, J (trans) Indiana University Press at 14 [emphasis original] (delivered as a course of lectures in 1923 and published posthumously). For the original text, see id (1988) *Ontologie (Hermeneutik der Faktizität)* in *Gesamtausgabe* vol LXIII Vittorio Klostermann at 18 [‘Das Wachsein’ / ‘ursprünglich(e) Selbstausslegung’] (emphasis original).

<sup>429</sup> Heidegger, M *Ontology* supra note 428 at 37. For the original text, see id *Ontologie* supra note 428 at 47 [‘unsere Aufgabe: dieses (das jeweilige Dasein) so in den verstehenden Blick zu bringen, daß in ihm selbst Grundcharaktere seines Seins abhebbar werden’].



(Recall Kötz's assertion: 'The critic is forced to conclude that on this point the German system is best'. Consider Beckett: 'I know those little phrases that seem so innocuous and, once you let them in, pollute the whole of speech'.<sup>430</sup>)

- What one does not see *chez* Kötz is even basic acknowledgment that one is dealing with different horizons of intelligibility and with different pre-understandings too. What one does not see is even basic acknowledgment that one is dealing in diatopical hermeneutics. What one sees, however, is normalising, irenic comparison being conducted by Kötz *qua* German lawyer asking himself 'what is *the* rule-solution to the problem formulated in terms of *the* rule-grid?' To be sure, no comparatist-at-law can step out of himself. But a comparatist cannot be allowed to remain himself *so*.
- There are only localised linguistic practices.
- There are only local stories.
- There are only localised comparatists-at-law (who, while they must seek to counteract identificatory and other phantasmatic tendencies, that is, negotiate their own subject positions vis-à-vis the focus of their study, need to accept that they can never, in fact, transcend them).
- 'whatever you have to say, leave  
the roots on, let them  
dangle

And the dirt

Just to make clear  
where they come from'<sup>431</sup>

- There will be affect in the comparatist's responsive attempt to understand the other-in-the-law and the other's law. The distance required for critical analysis is (thankfully) always contested by empathy or other emotions.
- Consider *Lawrence*. Now, reflect on Martin Loughlin's observations regarding the rootedness of law: 'The journey of finding effective, enlightened and liberating conditions of government is a journey through history and on tracks formed within specific cultural traditions. The maps drawn by societies other than our own are undoubtedly of innate interest; indeed, their strangeness and their difference make us welcome. But as guides to the journey they must be

<sup>430</sup> Beckett, S (1994) [1956] *Malone Dies* in *The Beckett Trilogy* John Calder at 193. The translation/re-writing from the French is Beckett's own.

<sup>431</sup> Olson, C (1987) [1950] 'These Days' in *The Collected Poems of Charles Olson* Butterick, GF (ed) University of California Press at 106.

treated with great circumspection. It is precisely those aspects that welcome us which pose major barriers to understanding them as practical guides. Their accessibility is deceptive since we read them as outsiders and this leads too easily to distortion. If we are serious about confronting the complex issues raised by an inquiry into democracy and public law, I believe that we must start by recognising that there can be no elsewhere which underwrites our existence'.<sup>432</sup>

- About *Lawrence*, still: 'Until we know the politics of the European presumptions and scope of review language, we are in no position to make a comparison'.<sup>433</sup>
- 'As a non-hegemonic epistemic enterprise, comparative constitutionalism needs to transform itself into constitutional ethnography', thus re-inscribing the 'legal' in terms of the normative structuring of a community.<sup>434</sup> It needs to be 'attentive to [the other's] presuppositions, [its] assumptions, [its] exclusions, [its] naiveties and [its] knaveries, [its] regimes of vision and [its] spots of blindness'.<sup>435</sup>
- The differential data that will emerge must lead to a differential analysis of juriscultures that does not aim to bury the inconvenient information in order to dissolve specific cultural forms into generic instrumental effects.
- Comparative thought must become the endless exploration of *differends*.<sup>436</sup> It must address legal cultures as constellations of radically different singularities-in-the-law, as sites for the exploration of incommensurable dissensus (across cultures) and of indomitable dissent (within cultures).
- Any comparison that is made without considerable strife will have highly underwhelming results.
- The differential value attaching to comparative legal studies also has an impact on the comparatist himself. The experience of alterity is 'the experience of self-differentiability'.<sup>437</sup>

<sup>432</sup> Loughlin, M (1993) 'The Importance of Elsewhere' (4) *Public Law Review* 44 at 57. As the author himself notes, his text is indebted to Larkin, P 'The Importance of Elsewhere' supra note 1 at 104.

<sup>433</sup> Shapiro, M (1980) 'Comparative Law and Comparative Politics' (53) *Southern California Law Review* 537 at 539. For another reflection acknowledging the embeddedness of constitutional law in culture, see, eg, Harlow, C (2002) 'Voices of Difference in a Plural Community' (50) *American Journal of Comparative Law* 339.

<sup>434</sup> Baxi, U 'Constitutionalism as a Site of State Formative Practices' supra note 293 at 1209. See also Asad, T (1997) 'On Torture, or Cruel, Inhuman, and Degrading Treatment' in Kleinman, A, Das, V and Lock, M (eds) *Social Suffering* University of California Press at 304: 'We need ethnographies of pain and cruelty that can provide a better understanding of how relevant practices are actually conducted in different traditions'. The author has in mind the modern conception of 'cruelty' with specific reference to Article 5 of the Universal Declaration of Human Rights ['No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'].

<sup>435</sup> Rose, N *Powers of Freedom* supra note 265 at 19.

<sup>436</sup> See Lyotard, J-F *Le différend* supra note 142. In the text, I borrow the word 'differend' from the English translation of Lyotard's: id (1988) *The Differend* Van Den Abbeele, G (trans) University of Minnesota Press.

<sup>437</sup> Terada, R (2001) *Feeling in Theory* Harvard University Press at 156.

- Bearing in mind the difficulties associated with the production of a fully-fledged presence of the law, which must feature even what is seemingly absent from it but which haunts it nonetheless — in other words, which must allow for the *spectrality* of the ‘legal’ — perhaps one should be content with something like comparative minimalism,<sup>438</sup> a kind of *comparatisme malgré tout* or Beckettian ‘comparing on’ that allows one to move beyond parochialism (it would be unacceptably easy to say that since no full transcultural understanding can be had, one might as well remain confined to one’s own world) while eschewing the utopia of one-law in favour of individuation such that the relationality across laws becomes one of singularities.<sup>439</sup> In an important sense, one compares because the alternative is worse. One compares because, well, how could one not?<sup>440</sup>

(Making present what is absent, acknowledging absence’s presence can hardly prove a serene endeavour. For one thing, where does this absence-that-is-present begin and where does it end? How can it be contained? How can it be kept under control? I am reminded of one of these plaques for which Paris is famous, which I see every time I pass the *quai Bourbon* on my way to the *Collège de droit comparé de la Sorbonne* in the Marais. The plaque honours the memory of sculptress Camille Claudel (1864-1943). In an 1886 letter to Rodin (which whom she was enmeshed in a tragic relationship), she wrote: ‘*Il y a toujours quelque chose d’absent qui me tourmente*’ (‘There is always something absent that torments me’). As I read this inscription on the old stone wall, it occurs to me, every time, that it aptly captures the predicament of comparatists-at-law.)

- I argue for a situational ethics of comparison allowing for discontinuity and disparity of particulars only adventitiously related (rather than being part of a universal or teleological process).
- The ‘model’ that I advocate does not propound difference-as-truth. It argues, rather, for difference *instead of* truth. I claim that my approach reveals more about laws, affords the comparatist to supply a more sophisticated account of laws. It also tells us more about the comparatist-at-law himself inasmuch as it serves to focus on his agency and creativity, on his constructive power. Kötz on English law is not Kötz representing and disseminating the truth of English law such that his account would be doubling what English law ‘is’. What we have — and what the recognition that the pursuit of truth is irretrievably doomed to

<sup>438</sup> Derrida refers to ‘a quasi-logic of the ghost that one ought to substitute, because it is stronger, to an ontological logic of the presence’: *Force de loi* supra note 24 at 68 [‘une quasi-logique du fantôme qu’il faudrait substituer, parce qu’elle est plus forte qu’elle, à une logique ontologique de la présence’].

<sup>439</sup> The preposition ‘on’ is a central motif in Beckett’s work. For an exploration of this theme, see Ackerley, CJ and Gontarski, SE (eds) (2004) *The Grove Companion to Samuel Beckett* Grove Press at 421.

<sup>440</sup> In his well-known paper on world literature, Moretti claims that there is ‘no other justification for the study of world literature [...] but [...] to be [...] a permanent intellectual challenge to national literatures’: Moretti, F (2000) ‘Conjectures on World Literature’ (Jan-Feb) *New Left Review* at 68. In other words, the point of comparativism is to refute nationalism.

failure permits us to see — is Kötz's view of English law. And this is all that we can ever have. *There are no guarantees.*

(If one insists on fitting the square peg of truth into the round hole of comparison, 'let truth be the prejudice'.<sup>441</sup> This means that one ought to remember, at the very least, what has been said with reference to the role of truth in historical accounts, that is, that 'there is no such thing as "the truth" about the historical past, though [...] there are many truths about it. [...] [W]hile we must demand that interpretations of the past should tell us the truth, in the sense that they should not lie or mislead, what we need them for is not to tell us something called "the truth about the past." We need them to be truthful, and to make sense of the past—to us'.<sup>442</sup> And one ought to ask such questions as these: 'How did it become possible to make truths about persons, their conduct, the means of action upon this and the reasons for such action? How did it become possible to make these truths in these ways and in this geographical, temporal and existential space? How were these truths enacted and by whom, in what torsions and tensions with other truths, through what contests, struggles, alliances, bribes, blackmails, promises and threats? What relations of seduction, domination, subordination, allegiance and distinction were thus made possible? And, from the perspective of our own concerns, what is thus made intelligible in our present truths (in a "cognitive" sense, but also in a bodily sense, in the sense of our habitual modes of being in the world and experiencing the world and ourselves in it, and the way in which the space of possible actions in that world has been put together) — what do our studies of governmentality make amenable to *our* thought and action, in the sense of us being able to count its cost and think of it being made *otherwise*'?<sup>443</sup>)

- I know that I will never capture other laws. I will, ultimately, fail. But I must do better than aim for better-law comparisons. I must '[f]ail better'.<sup>444</sup>
- 'What guides me is always untranslatability'.<sup>445</sup>
- Culture belongs to the sphere of *justice* rather than truth.
- Alterity is what is/must be central to comparison-at-law, not correctness.
- A comparatist-at-law is not a proselytiser and does not want to sound as if his analyses set things right. Now that my 'model' is available for dissemination and evaluation, it shall be *sanctioned* (ah! the very enigmaticity of the word...). I believe that my argument neither encourages cultural disengagement nor fosters non-learning. Rather, it allows for more insightful, profound, and

<sup>441</sup> The phrase is from Morris, JG (eds) (1996) *Let Truth Be the Prejudice: W. Eugene Smith, His Life and Photographs* Aperture. In this sense, at least, truth is no longer 'a term of praise' and loses its commendatory force: Rorty, R (1991) *Objectivity, Relativism, and Truth* Cambridge University Press at 127.

<sup>442</sup> Williams, B (2002) *Truth and Truthfulness* Princeton University Press at 257-58.

<sup>443</sup> Rose, N *Powers of Freedom* supra note 265 at 19-20 [emphasis original].

<sup>444</sup> Beckett, S (1990) [1983] *Worstward Ho* in *Nohow On* John Calder at 101.

<sup>445</sup> Armel, A (April 2004) 'Du mot à la vie: un dialogue entre Jacques Derrida et Hélène Cixous' *Magazine littéraire* at 26 ['Ce qui me guide, c'est toujours l'intraductibilité'].

illuminating interpretations than its competitors. As it promotes transformative and generative narratives (including, incidentally, anecdotal ones),<sup>446</sup> it enables a more edifying *yield*.<sup>447</sup> What I claim to be able to discern using my 'model' is not to be configured in terms of ever-deeper truths but as interpretive opportunities allowing for the kind of productive experiences that, in my view, comparatists-at-law and lawyers in general should want to internalise (consider a differential experience and the way in which it challenges one and contrast how an apprehension of similarity operates to consolidate one's stance *without calling anything into question*). Although I do want comparatists-at-law to emancipate their stifled thought from comparative orthodoxy and think differently (and differentially) about comparative interventions, it is not because my account is true. I would never say that 'the critic is forced to conclude' that my framework is 'better' than any other, that it is 'best'. I do not purport to constitute my demise of 'truth-in-the-law' as true. The only question is how persuasive my 'model' proves to be. The answer has to do with what it allows us to understand that, say, Kötz's 'model' does not.

- Meanwhile, Hein Kötz remains before us, in front of us. And so is the task of overtaking him.

(*Quaere*: If truth is an object of desire, can truth *ever* be overcome? In Spanish, '*ilusión*' — as in 'truth is an illusion' — is at once 'myth', or '*quimera*', and 'hope', or '*esperanza*'.<sup>448</sup>)

('One must have truth'.<sup>449</sup>)

('final belief / Must be in a fiction'<sup>450</sup>)

•

## APPENDIX I

The pertinent point could readily be made that the failure to establish an empirical link between 'culture' and 'result' does not mean that no such connection exists. Not everything is observable and not everything is observed. In fact, for Jerome Bruner, 'even the strongest causal explanations of the human condition cannot make plausible sense without being interpreted in the light of the symbolic world that constitutes human culture'.<sup>451</sup> There is more. Borrowing from neurophilosophy, one can identify a meaningful sense in which culture *can* legitimately be understood in causal terms, that is, can be accommodated to the dominant current of thought advocating the rule of computation and the goal of practical

<sup>446</sup> See, eg, Gallop, J (2002) *Anecdotal Theory* Duke University Press.

<sup>447</sup> Rorty stresses the value of 'edifying' as opposed to 'systematic' studies: Rorty, R *Philosophy and the Mirror of Nature* supra note 322 at 365-72.

<sup>448</sup> See generally Minkkinen, P (1999) *Thinking Without Desire* Hart.

<sup>449</sup> Derrida, J (1972) *Positions* Editions de Minuit at 79-80, note 23 ['(I) faut la vérité'] (emphasis original).

<sup>450</sup> Stevens, W (1990) [1942] 'Asides on the Oboe' in *The Collected Poems of Wallace Stevens* Vintage at 250.

<sup>451</sup> Bruner, J (1990) *Acts of Meaning* Harvard University Press at 138.

utility. This argument invites a brief exploration of the notion of ‘causality’. To claim that culture lacks causal relevance is to maintain that culture does not help to forecast events in human affairs in the way, say, the physical sciences allow for the prediction of events in the natural world. A threshold issue arises, therefore, which is that of the validity of the scientific model itself. In other words, if it is shown, for instance, that physical laws do not carry the forecasting value that they are assumed to have, it then becomes incongruous to discredit culture on account of the fact that, unlike physical laws, it does not foster predictability. What, then, of physical laws? A four-step reasoning is in order.<sup>452</sup> First, all events are contingent. Physical laws, then, can only state relations of *logical* necessity. In the words of Wittgenstein, ‘[a] necessity for one thing to happen because another has happened does not exist. There is only *logical* necessity’.<sup>453</sup> Secondly, a regularity or sequence of events can, accordingly, only be called ‘necessary’ on account of an inductive argument which would be based on their correlation. Thirdly, there is, however, no logical justification to accept an inductive argument.<sup>454</sup> To be sure, it is the case that probabilistic theories can now be regarded as valid scientific theories supplementing induction theories.<sup>455</sup> Fourthly, no absolute distinction, thus, can be established between laws of necessity (or causal laws) and mere correlations. The distinction is only a relative one. What I am stating is that the physical laws do not imply causality in the sense that is assumed (‘If A, then B’ or ‘All As are Bs’). It follows that to reject the validity of cultural understanding because it does not make behavioural events predictable is mistaken. In fact, if you will, culture offers a causal explanation but it is not ‘causal’ in the sense of a *necessary* relation amongst events. And this causal explanation can be regarded as being of the same order as that prevailing in the physical world. This point assumes in turn that culture does not represent a radically ‘distinct order of phenomena’ from the physical world which would behave according to its own principles and laws, that is, which would be understandable exclusively in ‘culturological’ terms.<sup>456</sup> For the proponents of such a dichotomy, there would be a natural order produced by physical processes and an arbitrary (or cultural) order generated by cognitive or mental processes. And the two worlds would be radically different. This view is defended by Leslie White, for instance.<sup>457</sup> Likewise, for Donald Davidson, there exists ‘an irreducible difference between psychological explanations that involve the propositional attitudes and explanations in sciences like physics and physiology’.<sup>458</sup> But

<sup>452</sup> I closely follow O’Meara, T (1997) ‘Causation and the Struggle for a Science of Culture’ (38) *Current Anthropology* 399.

<sup>453</sup> Wittgenstein, L (1922) [1921] *Tractatus Logico-Philosophicus* Ogden, CK (trans) Routledge and Kegan Paul § 6.37 at 181 [‘Einen Zwang, nach dem Eines geschehen müsste, weil etwas anderes geschehen ist, gibt es nicht. Es gibt nur eine logische Notwendigkeit’] (emphasis original in the English version).

<sup>454</sup> See Hume, D (1975) [1748] ‘An Enquiry Concerning Human Understanding’ in *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (3rd ed) Nidditch, PH (ed) Oxford University Press § 59 at 75: ‘It appears, then, that this idea of a necessary connexion among events arises from a number of similar instances which occur of the constant conjunction of these events; nor can that idea ever be suggested by any one of these instances, surveyed in all possible lights and positions. But there is nothing in a number of instances, different from every single instance, which is supposed to be exactly similar; except only, that after a repetition of similar instances, the mind is carried by habit, upon the appearance of one event, to expect its usual attendant, and to believe that it will exist’.

<sup>455</sup> Eg, Bell, J (1994) *Reconstructing Prehistory: Scientific Method in Archaeology* Temple University Press at 158: ‘knowledge is legitimate — scientific — if it is reducible to the facts within an acceptable range of probability’.

<sup>456</sup> White, LA (1949) *The Science of Culture* Grove Press at 406.

<sup>457</sup> *Ibid.*

<sup>458</sup> Davidson, D (1987) ‘Problems in the Explanation of Action’ in Pettit, P, Sylvan, R and Norman, J (eds)

this distinction can only be verified if human beings operate differently from other physical entities. Only if culture is devoid of any 'physical' dimension can the cultural world be regarded as radically autonomous vis-à-vis the physical world. However, interpretive understanding – which is rightly described as 'the characteristic mode of explanation in social science'<sup>459</sup> – does not provide a radical alternative to causal-mechanical explanation, but *requires* it. This is because '[p]eople make decisions and act largely on the basis of their information or beliefs about the world, stored and manipulated in the brain in the form of neural networks and other causal mechanisms and their physical states. Thus, the state of believing something is itself a physical state of a causal mechanism in the brain, where that mechanism may interact with others as part of a decision-making mechanism to initiate and direct behavior'.<sup>460</sup> To quote O'Meara: 'In fact, every step in the enactment, transmission, interpretation, and labeling of symbolic or meaningful behavior occurs by the causal-mechanical operations and interactions of physical entities'.<sup>461</sup> To return to culture, the argument can be propounded, therefore, that culture plays a causal role, not in the sense that it has causal efficacy in itself *qua* supra-individual or supra-organic or supra-physical pattern or structure, but in that the influence of tradition and so forth on human behaviour – the cosmology of beliefs that defines individuals' lives as members of a community over time – is relayed by physical realities such as brain mechanisms. It is through the brain that culture manifests itself in the actions of organic individuals. As such, these actions cannot unreasonably be said to be *causally* related to culture.<sup>462</sup> For Tim O'Meara, 'culture is the form that biology takes'.<sup>463</sup>

## APPENDIX II

A famous expression of Kant's views on universalism is collected in his *Toward Perpetual Peace*: 'Since the (narrower or wider) community of the nations of the earth has now gone so far that a violation of right on *one* place of the earth is felt in *all*, the idea of a cosmopolitan right is no fantastic and exaggerated way of representing right; it is, instead,

---

*Metaphysics and Morality: Essays in Honour of J.J.C. Smart* Blackwell at 35.

<sup>459</sup> Lukes, S (1973) 'Methodological Individualism Reconsidered' in Ryan, A (ed) *The Philosophy of Social Explanation* Oxford University Press at 127.

<sup>460</sup> O'Meara, T 'Causation and the Struggle for a Science of Culture' supra note 452 at 407.

<sup>461</sup> Id at 408.

<sup>462</sup> See, eg, Lakoff, G and Johnson, M (1999) *Philosophy in the Flesh* Basic Books at 555, where the authors argue that '[o]ur conceptual system is grounded in, neurally makes use of, and is crucially shaped by our perceptual and motor system'; Searle, JR (1995) *The Construction of Social Reality* Free Press at 228: 'there is a continuum from the chemistry of neurotransmitters such as serotonin and norepinephrine to the content of such mental states as believing that Proust is a better novelist than Balzac'.

<sup>463</sup> O'Meara, T 'Causation and the Struggle for a Science of Culture' supra note 452 at 227. Cf Bohannon, P *How Culture Works* supra note 71. For a recent argument to the effect that culture and biology are inextricably intertwined, see Richerson, PJ and Boyd, R (2005) *Not by Genes Alone* University of Chicago Press. *Contra*: Turner, SP (2002) *Brains/Practices/Relativism* University of Chicago Press, who claims that every mind is the product of a distinctive and individual learning history such that the idea of 'shared tacit knowledge' cannot hold. For complementary observations on causation, see Haskell, TL (1998) *Objectivity is Not Neutrality* Johns Hopkins University Press at 11-23, where the author distinguishes between the nomological and attributive modes of causal reasoning. This understanding of causation, which suggests that explanatory schemes are *ipso facto* causal ones, offers another way in which to link cause and culture, if this be comforting. For a general (and prominent) discussion of causal attribution written for (and by) lawyers, see Hart, HLA and Honoré, AM (1985) *Causation in the Law* (2nd ed) Oxford University Press at 9-25.

a supplement to the unwritten code of the right of a state and the right of nations necessary for the sake of any public rights of human beings and so for perpetual peace; only under this condition can we flatter ourselves that we are constantly approaching perpetual peace'.<sup>464</sup> Habermas's views on truth stand for a variation on the Kantian theme. Thus, in his *The Philosophical Discourse of Modernity*,<sup>465</sup> Habermas mentions '[t]he transcendent moment of *universal validity*', and in his *The Postnational Constellation*, he makes reference to 'the universalizing achievements of modernity',<sup>466</sup> to 'the promise that is bound up with [universalistic discourses]',<sup>467</sup> and to 'the context-transcendent force of truth claims'.<sup>468</sup> Indeed, the principle of universalisability is one of the cornerstones of Habermas's discourse ethics. Even though he purports to reject idealistic and transcendental accounts of reason and focus on everyday contextual requirements of conversation, Habermas continues to appeal to the Enlightenment tradition to the extent at least that he argues that a decentering of the self can happen in a relatively unproblematic fashion. Most recently, in his *Truth and Justification*,<sup>469</sup> he develops his theory of truth-as-consensus pursuant to which a validity claim is justified if it can be redeemed discursively, that is, if everyone following principles of rational (ie, unconstrained and undistorted) communication would agree with the relevant statement assuming participation in a discourse about it. The truth of statements thus depends on the possibility of a consensus (not, it must be emphasised, on actual consensus) and cannot adopt a monological form (ie, a process of 'debate' occurring in an individual mind). Irrespective of society's plurality, epistemic justification for Habermas requires consensus. For him, this is the ideal speech situation. A typical formulation concerning the 'principle of universalization' is the following: 'the impartiality of judgment is expressed in a principle that constrains *all* affected to adopt the perspectives of *all others* in the balancing of interests'.<sup>470</sup> Habermas specifically acknowledges that legal discourse fits his model of the co-operative search for truth.<sup>471</sup> However, there emerges a tension between Habermas's universalisation assertions and his acknowledgement of localism: 'The shared lifeworld offers a storehouse of unquestioned cultural givens from which those participating in communication draw agreed-upon patterns of interpretation for use in their interpretive efforts'.<sup>472</sup> But Habermas assumes the possibility of 'a decentered understanding of the world, which in turn forms the basis of action oriented

<sup>464</sup> Kant, I (1996) [1795] *Toward Perpetual Peace* in *Practical Philosophy* Gregor, MJ (ed and trans) Cambridge University Press at 330-31 [emphasis original]. The German reference is to [1923] *Kant's gesammelte Schriften* [KGS] vol VIII Königlich Preußischen Akademie der Wissenschaften (ed) Walter de Gruyter at 360: 'Da es nun mit der unter den Völkern der Erde einmal durchgängig überhand genommenen (engeren oder weiteren) Gemeinschaft so weit gekommen ist, daß die Rechtsverletzung an einem Platz der Erde an allen gefühlt wird: so ist die Idee eines Weltbürgerrechts keine phantastische und überspannte Vorstellungsart des Rechts, sondern eine notwendige Ergänzung des ungeschriebenen Codex sowohl des Staats- als Völkerrechts zum öffentlichen Menschenrechte überhaupt und so zum ewigen Frieden, zu dem man sich in der kontinuierlichen Annäherung zu befinden nur unter dieser Bedingung schmeicheln darf'.

<sup>465</sup> Habermas, J (1987) *The Philosophical Discourse of Modernity* Lawrence, F (trans) MIT Press at 322 [emphasis original].

<sup>466</sup> Id (2001) *The Postnational Constellation* Pensky, M (trans) MIT Press at 138.

<sup>467</sup> Id at 148.

<sup>468</sup> Id at 151.

<sup>469</sup> Id (2003) *Truth and Justification* Fultner, B (trans) MIT Press.

<sup>470</sup> Id (1990) *Moral Consciousness and Communicative Action* Lenhardt, C and Nicholsen, SW (trans) MIT Press at 65 [emphasis original].

<sup>471</sup> Id (1996) *Between Facts and Norms* Rehg, W (trans) MIT Press at 231.

<sup>472</sup> Id at 135.



toward reaching understanding'.<sup>473</sup> In *Between Facts and Norms*, Habermas acknowledges the difficulty: 'The idealization built into truth claims confronts us with the more ambitious task of explaining, in terms of the pragmatic conditions of argumentation, how the validity claims raised hic et nunc and aimed at intersubjective recognition or acceptance can, at the same time, overshoot local standards for taking yes/no positions, that is, standards that have become established in each particular community of interpreters'.<sup>474</sup> The tension between immanence and transcendence — or between facticity ('*Faktizität*') and validity ('*Geltung*') or factuality and ideality or factuality and counterfactuality — is nowhere more apparent than when Habermas, in his later writings, purports to combine a situated reason with a transcendent reason through the notion of 'transcendence from within'.<sup>475</sup>

<sup>473</sup> Id at 132.

<sup>474</sup> Id at 15.

<sup>475</sup> Id at 17-27. See also Habermas, J (1992) 'Transcendence from Within, Transcendence in this World' in Browning, DS and Fiorenza, F (eds) *Habermas, Modernity, and Public Theology* Crossroad at 226-50. For a critique of the universalist aspirations of Habermas's discourse ethics, see Heath, J (2001) *Communicative Action and Rational Choice* MIT Press at 175-311. There is a brief survey of Habermas's theory of truth in the context of comparative legal studies in Dammann, JC (2002) 'The Role of Comparative Law in Statutory and Constitutional Interpretation' (14) *St Thomas Law Review* 513 at 541-51. For a broader critique of rationalism, see Toulmin, S (1990) *Cosmopolis* University of Chicago Press. At 178, Toulmin writes as follows: 'For reasons of ethnographic fact, as much as of analytical argument, neither proposal for a rational philosophy — starting from either shared concepts or shared sensations — still holds water today. [...] The belief that, by cutting ourselves off from the inherited ideas of our cultures, we can "clean the slate" and make a fresh start, is as illusory as the hope for a comprehensive system of theory that is capable of giving us timeless certainty and coherence'.