

COMPARATIVE
LEGAL STUDIES:
TRADITIONS
AND TRANSITIONS

Edited by

PIERRE LEGRAND AND RODERICK MUNDAY



CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge, CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© Cambridge University Press 2003

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2003

Printed in the United Kingdom at the University Press, Cambridge

Typeface Adobe Minion 10.5/13.5 pt *System* $\text{\LaTeX}$ 2_ε [TB]

A catalogue record for this book is available from the British Library

ISBN 0 521 81811 7 hardback

The publisher has used its best endeavours to ensure that the URLs for
external websites referred to in this book are correct and active at the time
of going to press. However, the publisher has no responsibility for the
websites and can make no guarantee that a site will remain live or that the
content is or will remain appropriate.

CONTENTS

List of contributors vii

Introduction

- 1** Accounting for an encounter 3
 Roderick Munday

Comparative legal studies and its legacies

- 2** The universalist heritage 31
 James Gordley
- 3** The colonialist heritage 46
 Upendra Baxi
- 4** The nationalist heritage 76
 H. Patrick Glenn
- 5** The functionalist heritage 100
 Michele Graziadei

Comparative legal studies and its boundaries

- 6** Comparatists and sociology 131
 Roger Cotterrell
- 7** Comparatists and languages 154
 Bernhard Großfeld

Comparative legal studies and its theories

- 8 The question of understanding 197
Mitchel de S.-O.-l'E. Lasser
- 9 The same and the different 240
Pierre Legrand
- 10 The neo-Romantic turn 312
James Q. Whitman
- 11 The methods and the politics 345
David Kennedy

Comparative legal studies and its futures

- 12 Comparatists and transferability 437
David Nelken
- 13 Comparatists and extraordinary places 467
Esin Örücü

Conclusion

- 14 Beyond compare 493
Lawrence Rosen

Index 511

The same and the different

PIERRE LEGRAND

*Pour Casimir et Imogene, qui font toute la différence.
Auch für die, die andere Wege öffnet.*

It is rather like alluding to the obvious connection between the two ceremonies of the sword: when it taps a man's shoulder, and when it cuts off his head. It is not at all similar for the man.

(G. K. Chesterton)¹

One is at the mercy of others. One's view of oneself, for example, is shaped by the others' gaze. And, beyond specularly, one fears being encumbered by something alien to oneself. In order to accommodate the vagaries of dependency and to contain the threat that others may represent, it becomes necessary to ascertain whether others are friends or foes, which is tantamount to asking whether they are like or unlike one. Difference, then, can be invoked to the disadvantage of those to whom it is applied as when it serves to place an individual's or a community's distinctiveness in jeopardy through oppression, disavowal, exclusion or obliteration. Overt sexual or ethnic discrimination provide evident applications of this discursive strategy. But the logic of betrayal and rejection through differentiation

Apart from the few instances where I have chosen to use only an English translation on account of its currency (for example, see *infra*, note 15), I refer to original versions, whether on their own (for materials in French) or in addition to authoritative English translations whenever available (for texts in other languages). Unattributed English translations are mine. I am immensely grateful to Geoffrey Samuel, Nicholas Kasirer, Horatia Muir Watt, Roderick Munday, Georgina Firth, Mitchel Lasser, Peter Goodrich and Michel Rosenfeld, all of whom provided invaluable and emboldening friendship while I was researching and writing this paper. As it seems fair to assume that parts at least of my argument will be met with suspicion (or alarm!), the usual disclaimer appears especially apt.

¹ G. K. Chesterton, *Orthodoxy*, in *The Collected Works of G. K. Chesterton*, ed. by David Dooley, vol. I (San Francisco: Ignatius Press, 1986), p. 335 [1908].

can adopt more insidious forms. Consider the character of the mother in Nathalie Sarraute's *L'usage de la parole*. In differentiating, through a brutal naming of roles, between the various members of the family who had been huddling together on the sofa ('She shook them, she forced them to awake, to detach themselves from one another. You see, here we are: I can help you do the census. Here, in front of you: the father. This is the daughter. Here is the son'), the mother destroys the indistinction of the family bond. As she shatters the intimate embrace of family relations, her words inflict a cruel separation to those around her, who simultaneously find themselves at a distance from her because she has abruptly removed herself from the rest of the family (in the words of the narrator, 'why is it that she, the mother... she was not where she should have found herself, where one ordinarily finds her, between her husband, her daughter and her son. She was as far away from them as a stranger. Had she fled? Abandoned her dignity, her role as mother? 'Your father' 'Your sister'... words like herself, like everything around... icy and hard...').²

Ultimately, all linguistic, social and cultural activity is grounded in differential thinking, if only because of the originary and irreducible distance between word and object, between self and other. But difference is polymorphous and need not be apprehended as divisive and impoverishing. It can also be experienced as an affirmation, as an assertion of being. The act of differentiation regularly provides one with a vital capacity for action by enabling one to resist the erosion of boundaries between subjects, by allowing one to elude misrecognition or banishment, by permitting one to avoid violent confusions. Not only is difference, therefore, linked to the very matter of intelligibility (how could understanding – envisaged here as always-interpretation – come from indistinction?), but it is also connected to the possibility of social organization and to the survival of the individual, for it can be construed as aborting all possible totalization. It is this redemptive, empowering feature of differential thought – difference's responsive

² Nathalie Sarraute, *L'usage de la parole*, in *Oeuvres complètes*, ed. by Jean-Yves Tadié et al. (Paris: Gallimard, 1996), pp. 941 and 943–4 ['Elle les a secoués, elle les a obligés à se réveiller, à se détacher les uns des autres (...). (...) Vous voyez, nous voici, je peux vous aider à faire le recensement. Voici devant vous: le père. Voici la fille. Ici c'est le fils'; 'Mais alors, comment se fait-il qu'elle, la mère... elle n'était pas là où elle devait se trouver, où on la trouve d'ordinaire, entre son mari, sa fille et son fils. Elle était aussi loin d'eux qu'une étrangère (...). (...) Aurait-elle fui? Abandonné sa tenue, son rôle de mère? (...) "Ton père" "Ta soeur"... des mots comme elle-même, comme tout autour... glacés et durs...'] (1980) [hereinafter *Oeuvres complètes*]. I follow Ann Jefferson, *Nathalie Sarraute, Fiction and Theory* (Cambridge: Cambridge University Press, 2000), pp. 56–9.

and responsible *yes* – which this exercise in negative dialectics is committed to celebrating.³

* * *

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 which 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. I regard this paper as a variation on the theme of negative dialectics in the sense that it is largely an argument meant to negate clearly and emphatically the positivistic enterprise that (establishment-minded) comparative legal studies wants to be. Negativity, far from suggesting a ‘mood’ – one need not be a negative person in order to engage in negative dialectics – is a de-position or a dis-position, a distrust in positing and in positivity and in positivists and in the positivistic *Zeitgeist*, which must be *ex-posed* as the most important factor suppressing the contextual dimension of meaningful experience within comparative analysis. In this sense, negativity epitomizes the transformative role of theory as counter-discourse. It is, literally, an *undisciplined* gesture. 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 words, in the way it is ‘critically promot[ing] progressive social transformation’).⁴

* * *

Some further liminary observations are apposite, for instance, as regards the notion of ‘tradition’, which takes us beyond national boundaries and the problematic idea of ‘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

³ For a key and, *vis-à-vis* mainstream philosophical thought, disruptive treatment of difference as productive force, see Gilles Deleuze, *Différence et répétition* (Paris: Presses Universitaires de France, 1968). I refer to mainstream philosophical thought at *infra*, text accompanying notes 49–57. More generally, see Gilles Deleuze and Félix Guattari, *L’anti-Oedipe* (Paris: Editions de Minuit, 1972), where the authors contrast the Platonic or Christian conception of desire as lack, distress and suffering with the affirmative conception of a desire that is productive and creative.

⁴ Patricia J. Huntington, *Ecstatic Subjects, Utopia, and Recognition* (Albany: SUNY Press, 1998), pp. 10–11 and *passim*. See Johannes Fabian, *Anthropology with an Attitude* (Stanford: Stanford University Press, 2001), pp. 7, 100 and 93. See generally Theodor W. Adorno, *Negative Dialectics*, transl. by E. B. Ashton (London: Routledge, 1973). *Adde*: Susan Buck-Morss, *The Origin of Negative Dialectics* (New York: Free Press, 1977).

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 strategy of world-making predicated on the exclusion of the uncontainable.⁵

Now, I do not claim that legal traditions are sociologically equivalent, but that they are epistemologically comparable despite their uniqueness (in the sense that they constitute 'originary' discourse-producing units, in the way that they represent 'originary' sources of meaning or intention).⁶ Legal traditions are, of course, only virtually homogeneous and there is no doubt that they contain internal dissensions. Indeed, one can take as fundamental the facts of fragmentation, incoherence, transgression and conflict within interpretive communities: 'There is no single culture that constitutes an autarchic, self-established, and self-sufficient unity. Every culture cultivates itself with regard to other cultures and is cultivated by other cultures. There is no culture that has not emerged from the configuration of others [...] and has not been co-determined and transformed by these others at every moment of its history. Culture is a *plurale tantum*: it exists only in the plural.'⁷ Thus, I accept that the qualifiers 'civil law' and 'common law' do not refer in an exclusive way to one or the other of the western legal traditions. My point is rather that one will find traces of a legal or rhetorical or anthropological or sociological or political economy said to be 'civil law' more easily in jurisdictions having received Roman law and that one will find traces of a legal or rhetorical or anthropological or sociological or

⁵ 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 hermeneutic point. In an important essay, 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': Gerald L. Bruns, *Hermeneutics Ancient and Modern* (New Haven: Yale University Press, 1992), pp. 201–2.

⁶ For a reflection on the interaction between 'law' and 'tradition', see Martin Krygier, 'Law as Tradition', (1986) 5 L. & Phil. 237.

⁷ Werner Hamacher, 'One 2 Many Multiculturalisms', in Hent deVries and Samuel Weber (eds.), *Violence, Identity, and Self-Determination* (Stanford: Stanford University Press, 1997), pp. 295–6. See also Bhikhu Parekh, *Rethinking Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2000), pp. 76–9. For a graphic attempt at capturing cultural interaction, see Peter N. Stearns, *Cultures in Motion* (New Haven: Yale University Press, 2001).

political economy said to be ‘common law’ more easily in jurisdictions not having received Roman law. I ground this argument on my conviction that law is performance (whether voluntary or involuntary) – not a ‘being’, but a ‘doing’ – such that what makes civil law ‘civil law’ and what makes common law ‘common law’ takes place in a constituting process in which civil law and common law call upon each other as other in order to be able to fashion themselves and be what they are in difference from one another. I further base my claim on my own life experience, which has taken me repeatedly and for extended periods of time to civil-law and to common-law jurisdictions, whether as student, advocate, researcher or teacher. It is also my own life-in-the-law, that of someone without a mother-law, that of someone who was never locked inside the familiarity of one law, that of someone who is free to imagine oneself as either civil-law or common-law lawyer, that of someone who has constantly straddled western legal traditions, which has led me to write explicitly, as I have done on more than one occasion, against essentialism. ‘Civil-law’ and ‘common-law’ do not exist a priori as kinds of essences, but only a posteriori in multiple incarnations – none of which is pure. I believe in inescapable hybridity (which, incidentally, is why the notion of ‘mixed legal systems’ still advocated by many comparatists strikes me as somewhat unsophisticated). I have, therefore, never propounded a theory of ‘civil law’ or ‘common law’. In fact, I cannot relate to the idea of a specifically ‘civil-law’ or ‘common-law’ identity. (I do relate, however, to Ezra Pound’s line: ‘One says “I am” this, that, or the other, and with the words scarcely uttered one ceases to be that thing.’⁸) What I have advanced, and what I continue to advance, is a theory of dissidence or sub-alternity or marginality, that is, a theory of *positioning* which, specifically, adopts the view of common law as antirrhetic and argues that, historically, there can be no other position for the common law than *there* – a historical argument which has nothing to do with the question of the ‘intactness’ of any given politico-cultural *Lebenswelt*.⁹ Against that background, I assert that, understood as epistemological areas, the civil law and the common law, as they partake in a general and non-neutral agnostics which divides

⁸ Ezra Pound, *Gaudier-Brzeska: A Memoir* (New York: New Directions, 1960), p. 85 [1916].

⁹ In this respect, I derive compelling inspiration from Goodrich’s erudite publications. See Peter Goodrich, ‘*Ars Bablativa*: Ramism, Rhetoric, and the Genealogy of English Jurisprudence’, in Gregory Leyh (ed.), *Legal Hermeneutics* (Berkeley: University of California Press, 1992), pp. 43–82; *id.*, ‘Poor Illiterate Reason: History, Nationalism and Common Law’, (1992) 1 Soc. & Leg. Stud. 7; *id.*, *Oedipus Lex* (Berkeley: University of California Press, 1995), pp. 41–67 and *passim* [hereinafter *Oedipus Lex*].

the field of what is called, unconvincingly, 'western law' along the lines of nomothetism and idiographism (in a manner which may involve the staking of claims and the effort to appropriate), are irrevocably irreconcilable, even though we live them simultaneously and manage to reconcile them in an obscure and private economy.¹⁰ (*Quaere*: how, ultimately, could the self exist if the other were reconcilable with it?)

* * *

In a very important sense, the recent history of comparative legal studies must be read as a persistent, albeit not always adroit, attempt to identify sameness across laws and to demote difference to a *modus deficiens* of sameness.¹¹ As John Merryman observes, '[d]ifferences between legal systems have been regarded [...] as evils or inconveniences to be overcome.'¹² Not surprisingly, '[w]hen differences are discovered, gentility seems to require that [they] be dissolved.'¹³ Indeed, as he engages with his (impossible) object of study, 'the comparati[st] *presumes* similarities between different jurisdictions in the very act of searching for them' and assumes differentiating features to be largely indifferent.¹⁴ The desire for sameness breeds

¹⁰ I adopt and adapt Jacques Derrida, *L'écriture et la différence* (Paris: Le Seuil, 1967), p. 427.

¹¹ It would be mistaken to assume that comparatists-at-law always favoured sameness as their privileged epistemological register. For example, Montesquieu expressed his guiding principle in the following terms: 'not to consider as similar those instances that are really different and not to overlook the differences in those that appear similar': *De l'esprit des lois*, in *Oeuvres complètes*, ed. by Roger Caillois, vol. II (Paris: Gallimard, 1951), p. 229 ['ne pas regarder comme semblables des cas réellement différents; et ne pas manquer les différences de ceux qui paroissent semblables'] (1748). A genealogy of comparative legal studies also attests to signal and influential contributions to the thematization of difference in sixteenth-century France. This discourse has since been suppressed. But see Jean-Louis Thireau, 'Le comparatisme et la naissance du droit français', *Revue d'histoire des facultés de droit et de la science juridique*, 1990, Nos. 10/11, p. 153, who offers useful materials toward the recuperation of comparative legal studies's alternative enunciatory site. One is reminded of Benjamin's observation: 'The perception of similarities thus seems to be bound to a moment in time': Walter Benjamin, 'Doctrine of the Similar', in *Selected Writings*, ed. by Michael W. Jennings, Howard Eiland and Gary Smith and transl. by Michael W. Jennings, vol. II: 1927–1934 (Cambridge, Mass.: Harvard University Press, 1999), p. 696 [1933]. For the original text, see *id.*, 'Lehre vom Ähnlichen', in *Gesammelte Schriften*, ed. by Rolf Tiedemann and Hermann Schweppenhäuser, vol. II, t. 1 (Frankfurt: Suhrkamp, 1977), pp. 204–5 ['Die Wahrnehmung von Ähnlichkeiten also scheint an ein Zeitmoment gebunden'].

¹² John H. Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law', in Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Leyden: Sijthoff, 1978), p. 195.

¹³ Richard Hyland, 'Comparative Law', in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), p. 196.

¹⁴ Joseph Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986), p. 65 [my emphasis].

the expectation of sameness which, in turn, begets the finding of sameness. Even a posteriori re-presentations contradicting sameness appear not to prevent comparatists from 'catch[ing] sight [...] of the grand similarities and so to deepen [their] belief in the existence of a unitary sense of justice'.¹⁵ Illustrations of the reigning proleptical orthodoxy abound.

In his general report to the 1900 Paris Congress, Edouard Lambert claimed that 'the comparatist, in order to fulfil his task, must select [as the object of his comparison] the most similar laws.'¹⁶ For a French jurist, therefore, the study of English law ought to occur only 'accessorily'; it must occupy no more than 'a discreet place'.¹⁷ However, 'a comparison can be very usefully drawn between the Latin group and the Germanic group' – that is, among legal 'systems' partaking in the Romanist legal tradition.¹⁸ For Ernst Rabel, '[comparative research] ascertains throughout the world the facts common to all, the common life problems, the common functions of the legal institutions.'¹⁹ Konrad Zweigert and Hein Kötz indeed postulate a '*praesumptio similitudinis*' to the effect that 'legal systems give the same or very similar solutions, even as to detail, to the same problems of life', so that a finding of difference should lead comparatists to start their investigation afresh. In these authors' words, 'the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed his original question were [...] purely functional, and whether he has spread the net of his researches quite wide enough.'²⁰ For Alan Watson, the circulation and reception of legal rules point to substantial sameness across laws. One of the numerous illustrations developed by this author over the years concerns the rules on transfer of ownership and risk in sale: 'Before the *Code civil* the Roman rules were generally accepted in France [...]. This was also the law accepted

¹⁵ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3d ed. transl. by Tony Weir (Oxford: Oxford University Press, 1998), p. 3.

¹⁶ Congrès international de droit comparé, *Procès-verbaux des séances et documents*, vol. I (Paris: L.G.D.J., 1905), p. 49 ['le comparatiste juriste, pour remplir sa tâche, doit choisir (comme objet de sa comparaison) les législations les plus semblables'].

¹⁷ *Ibid.* ['à titre accessoire'; 'une place plus effacée'].

¹⁸ *Id.*, p. 48 ['la comparaison pourra être établie très utilement entre le groupe latin et le groupe germanique'].

¹⁹ Ernst Rabel, 'Comparative Conflicts Law', (1949) 24 *Indiana L.J.* 353, p. 355.

²⁰ Zweigert and Kötz, *supra*, note 15, pp. 39–40.

by the first modern European code, the Prussian *Allgemeines Landrecht für die Preußischen Staaten* of 1794.²¹ According to Ugo Mattei, there exists, and there can be discovered, a ‘common core of efficient principles hidden in the different technicalities of [...] legal systems.’²² Thus, ‘common core research is a very promising tool for unearthing deeper analogies hidden by formal differences.’²³ Rudolf Schlesinger’s own ‘common-core’ project, which concerned contract formation, was directed toward the formulation of an area of agreement ‘in terms of precise and narrow rules.’²⁴ Various contemporary applications demonstrate the enduring attraction of Schlesinger’s *esprit de simplification* and offer fully or partly mimetic variations on his coarse model.²⁵ For his part, Basil Markesinis argues that ‘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.’²⁶ 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*.’²⁷ This kind of dissembling, this brand of speculative auto-semanticization whereby sameness is equated with thought about sameness, effectively aiming to dispossess the other-in-the-law of his strangeness, readily prompts one to ask whether comparatists who make an ideological investment in sameness believe in their myths, whether they are being tenaciously *delusional* or stubbornly *disingenuous*.²⁸ Do comparatists, as they disclose a comprehensive attitude

²¹ Alan Watson, *Legal Transplants*, 2d ed. (Athens, Georgia: University of Georgia Press, 1993), p. 83.

²² Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997), p. 144.

²³ Mauro Bussani and Ugo Mattei, ‘The Common Core Approach to European Private Law’, (1997–8) 3 *Columbia J. Eur. L.* 339, p. 340.

²⁴ Rudolf B. Schlesinger, ‘Introduction’, in *id.* (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, vol. I (Dobbs Ferry: Oceana, 1968), p. 9.

²⁵ For example, see Hein Kötz and Axel Flessner, *European Contract Law*, vol. I (by Kötz): *Formation, Validity, and Content of Contracts; Contract and Third Parties*, transl. by Tony Weir (Oxford: Oxford University Press, 1997); Christian von Bar, *The Common European Law of Torts* (Oxford: Oxford University Press, 1998 and 2000), 2 vols.; Walter van Gerven, Jeremy Lever and Pierre Larouche, *Tort Law* (Oxford: Hart, 2000).

²⁶ Basil S. Markesinis, ‘The Destructive and Constructive Role of the Comparative Lawyer’, *RabelsZ*, 1993, p. 443.

²⁷ *Id.*, ‘Why a Code is Not the Best Way to Advance the Cause of European Legal Unity’, (1997) 5 *Eur. R. Priv. L.* 519, p. 520 [my emphasis].

²⁸ Note that such ideological investment can appear particularly crude as is the case when the measure of good law becomes the maximization of cost-effectiveness. 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

preceding the facts which are supposed to call it forth, act out of *wishful thinking* or in *bad faith*?²⁹ Perhaps more accurately, do they indulge in *double belief* through two contrary reactions, simultaneously recognizing and rejecting ‘reality’, that is, acknowledging the ‘reality’ of difference through the persistence of perception and yet disavowing or repressing it in order to make themselves believe something else?³⁰ Does the main goal of ideology not become the consistency of ideology itself? Another (related) question arises: are comparatists at all aware of the cognitive impairment which their attitude inevitably entails?

In sum, the picture painted by Tullio Ascarelli remains compelling: comparative legal studies is either concerned with unification of laws within substantive or geographical limits or is more philosophically inclined and aspires to a uniform law that would be universal.³¹ Under both approaches, the point is not to explain legal diversity, but to explain it away, to contain it in the name of an authoritative ideal of knowledge and truth somehow deemed to be *above* diversity, to be intrinsically diversity-free. Such ideas are, in fact, expressly articulated in Unidroit’s *Principles of International Commercial Contracts*, an ostensibly comparative endeavour: ‘The objective of the Unidroit Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the

numbers it effectively propounds. As it instrumentalizes values, economic analysis speaks to our conception of ourselves as moral beings. In the process, it significantly impoverishes us. Consider Deborah A. Stone, *Policy Paradox and Political Reason* (New York: HarperCollins, 1988), pp. 136–7: ‘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. [...] 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.’ For a comprehensive argument along these lines, see Janice G. Stein, *The Cult of Efficiency* (Toronto: Anansi, 2001).

²⁹ I borrow the formulae from Duncan Kennedy, *A Critique of Adjudication* (Cambridge, Mass.: Harvard University Press, 1997), pp. 191–4.

³⁰ For discussion, see Sigmund Freud, ‘Splitting of the Ego in the Process of Defence’, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, transl. by James Strachey et al., vol. XXIII (London: Hogarth Press, 1964), pp. 275–8 [1938]; *id.*, ‘Fetishism’, vol. XXI (1961), pp. 152–7 [1927]. For the German texts, see *id.*, ‘Die Ichspaltung im Abwehrvorgang’, in *Gesammelte Werke*, ed. by Anna Freud et al., vol. XVII: *Schriften aus dem Nachlass* (Frankfurt: S. Fischer, 1941), pp. 57–62; *id.*, ‘Fetischismus’, vol. XIV: *Werke aus den Jahren 1925–1931* (1948), pp. 309–17.

³¹ Tullio Ascarelli, ‘Etude comparative et interprétation du droit’, in *Problemi giuridici*, vol. I (Milan: Giuffrè, 1959), p. 321.

economic and political conditions of the countries in which they are to be applied.³² The frantic urge to eliminate difference as a valid analytical focus for comparative legal studies – without any apparent concern for what is being lost along the way – has even prompted James Gordley to write that ‘there is no such thing as a French law or German law or American law that is an independent object of study apart from the law of other countries.’³³ The outreach of the dominant and enveloping epistemological discourse that has operated an institutionalization of sameness and ensured the disqualification of difference – that has wanted to bring matters to a kind of degree zero of comparatism – is not in doubt.³⁴ Through the development of a monistic framework, comparatists have made it their collective and coercive purpose to proscribe what they regard as disorder and to invalidate what they apprehend as dissonance. Difference, then, is in tension with the comparative project of wanting to get things right, to keep things straight. It is in tension with the self-control that purports to characterize comparative legal studies’s totalizing, *hygienic* style. In fact, the forgetting of difference 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 denies difference and denies this denial). The meaningful is the concordant; indeed, the only legitimate discourse is the concordant (such that there emerges a reassuring concordance in the comparatists’ lives themselves). In Jean Bollack’s words, ‘one believes or one wants the text to mean what one wants or believes. This search for non-difference is the strongest censorship.’³⁵ From the control desks in Hamburg,

³² Governing Council of Unidroit, ‘Introduction’, in Unidroit, *Principles of International Commercial Contracts* (Rome: International Institute for the Unification of Private Law, 1994), p. viii [hereinafter *Unidroit Principles*]. A related expression of the universalizing agenda is developed in Mireille Delmas-Marty, *Trois défis pour un droit mondial* (Paris: Le Seuil, 1998).

³³ James Gordley, ‘Comparative Legal Research: Its Function in the Development of Harmonized Law’, (1995) 43 Am. J. Comp. L. 555, p. 566.

³⁴ In terms of the conditions of ‘impossibility’ within the discipline of comparative legal studies – that is, ‘the conditions under which arguments, categories, and values impose and maintain a certain authority’ – this unstated dogma points to prevailing institutional and structural constraints and shows the way in which, through politically conditioned criteria of acceptability, normalizing power is exercised, for example, as regards the funding of research projects, the creation of journals or the organization of conferences. I am, therefore, simply unable to agree with Schlesinger, who remarks, without adducing evidence, that ‘[t]raditionally, [comparatists] have tended to dwell more heavily on differences than on similarities’: Schlesinger, *supra*, note 24, p. 3, n. 1. The other quotations are from Samuel Weber, *Institution and Interpretation*, 2d ed. (Stanford: Stanford University Press, 2001), p. 19.

³⁵ Jean Bollack, *Sens contre sens* (Genouilleux: La passe du vent, 2000), pp. 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’].

Trento, Osnabrück, Maastricht, Rome, Utrecht and Copenhagen, the self-appointed spokesmen of reason, unclouded by any personal proclivities, able to take the long and detached view, wage an unceasing campaign to smother difference and bridle chaos, to evict and supplant the disruptive and deregulating impact of (bigoted) local impulses, to cleanse the law of all contingent and transitory traits best regarded as belonging to an obsolete era and as surviving into the present under false pretences, aptly apprehended as resilient distortions (from what?), properly envisaged, ultimately, as something of a scandal, as a morbid state of affairs yearning to be rectified. In their eschatological compulsion to design the absolute set of *regulae ad directionem civitatis*, they need to take the law in hand, to lay claim to it, to make it answerable to their programmes.

* * *

By purporting to wrest comparatists away from narcotizing theology, by trying to drive the received assumptions and the heuristic fictions they generate into productive crisis, I aim to move comparative legal studies beyond resolute technical confidence, synaesthetic or monumental vision and *mathesis universalis*. I argue for a protocol of action foregrounding an interpellative and interlocutory ethics upon which all other structures organizing 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 calls for the voice of the other and, specifically, for the voice of the other-in-the-law to be allowed to be heard above the chatter seeking to silence it. It 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 actions and taken by him as being either true or correct. The hermeneutic exigencies of a non-totalizing thought, a thought which accepts the other as interlocutor, which finds its closest grammatical analogue in the vocative, which allows the other (and the other-in-the-law) to signify according to himself and to his own *obviousness*, which accepts that the other is not just a modality of the self, which is, ultimately and empathically, *for the other*,³⁶ wants to be read as an announcement and as a summation, as a demand and as a complaint and, in any event, as the principle of a comparison whereby the comparatist is prepared to engage in self-distanciation from his own assumptions and orientations (which, then, no longer partake in truth), is interested in a variety of responses to ‘reality’

³⁶ For a thoughtful reflection on being ‘for the other’, see Zygmunt Bauman, *Postmodern Ethics* (Oxford: Blackwell, 1993), p. 90.

and is keen to grasp the unique significance of these responses for given communities, such that his understanding of the world is stronger and that he lives more knowledgeably. Unlike mainstream comparative thought, which enunciates itself in the form of progressive exclusions setting aside precisely the cases where there would be ambiguity in order to replace them with the orderly rule of abstract and formal reason, the non-totalizing thought I advocate – ‘the anxious thought, the thought in pursuit of its object, the thought in search of dialectical occasions to step out of itself, to break from its own frames’³⁷ – accepts that ‘the little orders and “systems” we carve out in the world are brittle, until-further-notice, and as arbitrary and in the end contingent as their alternatives’, that ‘the “messiness” will stay whatever we do or know.’³⁸ (After all, in the end, ‘only death is unambiguous, and escape from ambivalence is the temptation of Thanatos.’³⁹) Non-totalizing thought takes the view that, rather than assault its *Sache*, it must grant experience in all its looseness and complexity in all its formlessness an open field. As it purports to re-enchant the law-world-as-cultural-form (to allude to a familiar Weberian theme), non-totalizing thought within comparative legal studies immediately invites a consideration of the subject-matter of ‘representation’. Is comparison not premised on a belief that, in the context of a transaction between self and other mediated by a third term that is the meeting-point in language, another law is capable of being re-presented?

* * *

In the process of comparison, something is made accessible. But ‘it’ becomes accessible only on account of the very act of comparison, under *its* conditions or presuppositions. Although that to which comparison refers exists without comparison, once it is captured by comparison it is affected by comparison and its *Vorstellung* must turn on the act of comparison being itself understood in terms of its determining moments, both historical and structural. In this respect, I claim that one must accept that the critical distance between one and that which is being suspended at the end of one’s gaze (let us say, foreign law) accounts for the condition of possibility of all perception itself. Any idea that the comparatist ought to gain access to the legal perspective ‘from within’ or to the legal community’s ‘inner perspective’ – Hartian or otherwise – and that he ought do so through a strategy of

³⁷ Gaston Bachelard, *Le nouvel esprit scientifique*, 4th ed. (Paris: Presses Universitaires de France, 1991), p. 181 [‘la pensée anxieuse, (...) la pensée en quête d’objet, (...) la pensée qui cherche des occasions dialectiques de sortir d’elle-même, de rompre ses propres cadres’] (1934).

³⁸ Bauman, *supra*, note 36, pp. 33 and 32, respectively. ³⁹ *Id.*, p. 109.

‘immersion’ is, therefore, to be rejected. Because the disclosure of the other’s conceptions and of the symbolic-ontological basis underlying those conceptions may allow the observer to uncover structures that run counter to the observed’s self-understanding, critical distance is key: ‘A dissenter’s exact imagination can see more than a thousand eyes peering through the same pink spectacles, confusing what they see with universal truth, and regressing.’⁴⁰ Critical distance remains, in any event, unavoidable since one cannot ‘be’ the other. Despite the painful (and necessary) exertions of the observer, the gap between that which is being said and that about which that which is being said is being said simply cannot vanish. This *décalage* means that differentiation must be central to any comparative study.

The point is to stress that the assumed link between ‘re-presentation’ and ‘resemblance’ is mistaken. In fact, denotation lies at the heart of any re-presentative strategy and it stands independently from any notion of ‘resemblance’. Consider a painting, any painting, say, Balthus’s *La leçon de guitare*. In what way can the piano featured in the painting be said to ‘be’ a piano? To assert that ‘the piano-in-the-painting’ resembles a piano would imply that a piano resembles ‘the piano-in-the-painting’, which, in the case of this particular painting, simply cannot be the case since ‘[the keys] are zebra-striped – alternating black and white, of equal size and scale, directly next to one another – a far cry from real piano keys, in which the black sharps and flats are smaller and sit atop the larger white ones.’⁴¹ The re-presentative relationship, however, does not require such symmetrical connections; it works otherwise. The fact that ‘the piano-in-the-painting’ re-presents a piano need not imply that a piano re-presents ‘the piano-in-the-painting’. That re-presentation stands independently from resemblance is also apparent when Casimir and Imogene, aged eight and six, use the salter, the pepper pot and the sugar bowl to ‘play the metro’ at the restaurant. Surely, the salter does not resemble a metro door. Yet, it is made to re-present it.⁴² Take another example to emphasize further the distinction between

⁴⁰ Adorno, *supra*, note 4, p. 46. For the original text, see *id.*, *Negative Dialektik* (Frankfurt: Suhrkamp, 1966), p. 56 [‘Exakte Phantasie eines Dissentierenden kann mehr sehen als tausend Augen, denen die rosarote Einheitsbrille aufgestülpt ward, die dann, was sie erblicken, mit der Allgemeinheit des Wahren verwechseln und regredieren’].

⁴¹ Nicholas Fox Weber, *Balthus* (New York: Knopf, 1999), pp. 224–5.

⁴² Like Jean Piaget, Benjamin took a keen interest in child cognition. Unlike Piaget, however, he insisted on the historical specificity of the development of formal rational operations and drew a link between mimetic capacity, similarity and childhood. For example, see Walter Benjamin, ‘One-Way Street’, in *Selected Writings*, ed. by Marcus Bullock and Michael W. Jennings and

‘re-presentation’ and ‘resemblance’. Assume two cats sitting side by side. Would it occur to anyone to say of cat #1 that it ‘re-presents’ cat #2? But one might comment, of course, that cat #1 resembles cat #2.⁴³

At this stage, I suggest a brief visit to Borges’s enchanted world. In his *Historia universal de la infamia*, one of the stories tells about an empire where the art of cartography had been developed to such perfection that the map of a single province occupied a whole town and the map of the empire covered a whole province. In time, these enormous maps no longer gave satisfaction and the college of cartographers established a map of the empire which was the size of the empire and coincided with it point for point. Subsequent generations reflected that this inflated map was useless and abandoned it.⁴⁴ Not unlike the cartographers’ ultimate map of the empire, a comparative practice that purported to mirror the laws being compared and sought to avoid any schematization whatsoever would be devoid of value. The interest of comparative research lies precisely in the fact that it embodies hermeneutic interventions upon laws or schematizations of laws (irrespective of how much transformative ambition the comparatist may, or may not, actually harbour). Comparative work about law offers a tactical attempt to impute intellectual coherence to law as it is perceived. Accordingly, comparative legal studies fashions its account as an instance of transacted simplification or ascribed complexification.

To an important extent, of course, any comparative re-presentation is governed by what is ‘there’, that is, by that which is being re-presented by the comparatist. But more is involved, for to re-present implies emotional

transl. by Edmund Jephcott, vol. I: 1913–1926 (Cambridge, Mass.: Harvard University Press, 1996), p. 465: ‘[The child’s] dresser drawers must become arsenal and zoo, crime museum and crypt. “To tidy up” would be to demolish an edifice full of prickly chestnuts that are spiky clubs, tinfoil that is hoarded silver, bricks that are coffins, cacti that are totem poles, and copper pennies that are shields’ [1928]. For the German text, see *id.*, *Einbahnstraße*, in *Gesammelte Schriften*, ed. by Rolf Tiedemann, Hermann Schweppenhäuser and Tillman Rexroth, vol. IV, t. 1 (Frankfurt: Suhrkamp, 1972), p. 115 [‘Seine Schubladen müssen Zeughaus und Zoo, Kriminalmuseum und Krypta werden. “Aufräumen” hieße einen Bau vernichten voll stachliger Kastanien, die Morgensterne, Stanniolpapiere, die ein Silberhort, Bauklötze, die Särge, Kakteen, die Totembäume und Kupferpfennige, die Schilde sind’]. See generally Susan Buck-Morss, *Walter Benjamin and the Arcades Project* (Cambridge, Mass.: MIT Press, 1989), pp. 262–75.

⁴³ See Jean-Pierre Cometti, *Art, représentation, expression* (Paris: Presses Universitaires de France, 2002), pp. 25–43.

⁴⁴ Jorge Luis Borges, ‘Histoire universelle de l’infamie’, in *Oeuvres complètes*, ed. and transl. by Jean-Pierre Bernès, vol. I (Paris: Gallimard, 1993), p. 1509 [1935]. Reference to the French version of this text is justified by the fact that Borges himself ascribed authoritative status to it over the Spanish original: *id.*, p. 1508.

and intellectual commitments that lead the re-presentation to look this way rather than that: the very fact of cognitive selection displays the contingent character of the product of that selection. The choice of materials by the re-presenter is an act of power, if only because these materials always take the place of other materials that are omitted as part of the re-presentation. The act of selection, therefore, insensibly moves the selector from the descriptive to the prescriptive mode. Thus, the comparatist is *never* merely describing in comparative terms two or three laws which are ‘there’. Rather, he is *prescribing* two or three laws through his comparative framework, that is, he is bringing a range of manifestations of the legal into accord with specific intellectual goals by enclosing them within a calculative regime. Because it is never strictly constative (or iconic), description is ascription. And any description that is not strictly ‘descriptive’ must differ from that which is being ‘described’.⁴⁵ Because the *Lebenswelt* is antepredicative, the word can only mark a separation from it, which means that the defeat of the *logos* is certain. The unavoidable variations between an original (say, ‘the foreign law’) and a diagrammatic replica of it, no matter how purportedly totalizing (say, ‘comparative analysis’), entail the inevitably limited character of the act of re-presentation. I argue that even ‘straightforward’ repetition implies the new, such that *any* repetition can be said to *engender* the new, that is, to produce difference.⁴⁶ In fact, etymology teaches that a re-presentation is something which is presented *anew*. How, indeed, could the second performance replicate in all respects that of the opening night? How could it not differ? How could re-staging not engender difference? Accordingly, I find it helpful to refer to ‘re-presentation’ rather than ‘representation’ – to disturb the smooth linguistic surface – in order to mark the distance or the detachment characterizing the (non-) *reprise* and thus move away from the idea of ‘representation’ as falling under the authority of the principle of identity. (*Quaere*: what intellectual/emotional disposition is required for someone to ‘see’ that the act of ‘reproduction’ cannot overcome singularity, that re-presentation is tied in a necessary and non-suppressible fashion to *ex post*

⁴⁵ Cf. Deleuze, *supra*, note 3, p. 74: ‘every time there is representation, there is always an unrepresented singularity’ [‘chaque fois qu’il y a (...) représentation (...), il y a toujours une singularité non représentée’].

⁴⁶ See Jacques Derrida, *Marges de la philosophie* (Paris: Editions de Minuit, 1972), pp. 374–81, who links the idea of ‘repetition’ with that of ‘differentiation’ through his notion of ‘iterability’ – a neologism which, etymologically, wishes to connote at once ‘reiteration’ and ‘alterity’; Jean-François Lyotard, *La phénoménologie*, 11th ed. (Paris: Presses Universitaires de France, 1992), p. 43. See also Maurice Merleau-Ponty, *Phénoménologie de la perception* (Paris: Gallimard, 1945), pp. 388–9.

facto perception even as the re-presenting statement purports faithfully to account for what was presented? In the end, all depends on openness onto the sphere of what is not one's own or on the consciousness of an interpreter, which is constituted by a dialectical combination of non-presence and presence – a kind of primordial intuition allowing one to know that one does not know or does not know enough.)

This argument can be made in modified terms from a related perspective. Sameness, of course, governs the central strategy of mediation deployed by the comparatist as he aims to show that another law which may initially appear irrational is at least sensible and perhaps necessary. In other words, difference is recast *ab initio* as being well within the limits of understanding, of the comparatist's understanding and, in the final analysis, of sameness (for example, a French comparatist writes that the exponential growth of the tort of negligence in English law – in a context where other torts did not develop along such spectacular lines – recalls the expansive judicial interpretation of art. 1384 of the French civil code). However, at the very moment that sameness is constructed, it finds itself disproved on account of the fundamental difference between observer and observed. Each time sameness emerges, it is simultaneously annihilated by the very fact that it is the product of the discursive power of the observer, who has re-formulated the observed's experience on the basis of something the observed does not know in the way that the observer claims to be able to know (for example, the remark concerning the English law of negligence is a product of the French comparatist's imagination working on the basis of French data not readily accessible or suggestive to an English lawyer and showing how the other is simply disclosed through the self's habitual and antepredicative patterns of thought; indeed, the development of art. 1384 of the French civil code constitutes a move *away* from fault-based liability). It follows that it is impossible for the comparatist-as-observer ever to demonstrate sameness non-ethnocentrically because any understanding on his part assumes integration into his already-understood world, a world he cannot actually reflect himself out of. In other words, it is his privileged vantage point which informs the very formation of sameness (for example, the French comparatist subsumes the indigenous English experience under the correlation between the English law of negligence and art. 1384 of the French civil code).⁴⁷ Because the comparatist is being-situated, because he

⁴⁷ For the parallel between English and French law mentioned in the text, see René David and Xavier Blanc-Jouvan, *Le droit anglais*, 9th ed. (Paris: Presses Universitaires de France, 2001), p. 117.

always comes to the matter armed with his materially embedded, culturally situated understanding – which can, therefore, be apprehended as a ‘pre-understanding’ as regards what it is that he is studying⁴⁸ – explication of (other) meaning is, thus, articulation of difference. Indeed, the more reflective and self-critical the process of understanding another legal culture becomes, the more differential the comparatist’s account proves to be.

* * *

It is precisely the irreducibility of difference within the act of representation, seen to be marking the *limits* of re-presentation, that has historically made difference subservient to sameness. Paul Feyerabend offers a somewhat caustic panorama: ‘Almost all [philosophers] praised oneness (or, to use a better word, monotony) and denounced abundance. Xenophanes rejected the gods of tradition and introduced a single faceless god-monster. Heraclitus heaped scorn on *polymathi’e*, the rich and complex information that had been assembled by commonsense, artisans and his own philosophical predecessors, and insisted that “what is Wise is One.” Parmenides argued against change and qualitative difference and postulated a stable and indivisible block of Being as the foundation of all existence. Empedocles replaced traditional information about the nature of diseases by a short, useless but universal definition. Thucydides criticized Herodotus’s stylistic pluralism and insisted on a uniform causal account. Plato opposed the political pluralism of democracy, rejected the view of tragedians such as Sophocles that (ethical) conflicts might be unresolvable by “rational” means, criticized astronomers who tried to explore the heavens in an empirical way and suggested tying all subjects to a single theoretical basis.’⁴⁹ Crucial to the process of subjugation of pluralism to unity,

⁴⁸ The notion of ‘pre-understanding’ (*Vorverständnis*) is famously developed in Hans-Georg Gadamer, *Truth and Method*, 2d ed. transl. by Joel Weinsheimer and Donald G. Marshall (London: Sheed & Ward, 1993), pp. 265–307 [1960]. It is indebted to Heidegger’s idea of ‘fore-conception’ (*Vorgriff*). See Martin Heidegger, *Being and Time*, transl. by John Macquarrie and Edward Robinson (Oxford: Blackwell, 1962), p. 191: ‘the interpretation has already decided for a definite way of conceiving [the entity we are interpreting], either with finality or with reservations; it is grounded in something we grasp in advance – in a *fore-conception*’ [emphasis original] (1927) [hereinafter *Being and Time*]. (I refer to the standard English edition.) For the German text, see *id.*, *Sein und Zeit*, 18th ed. (Tübingen: Max Niemeyer, 2001), p. 150 [*‘Wie immer – die Auslegung hat sich je schon endgültig oder vorbehaltlich für eine bestimmte Begrifflichkeit entschieden; sie gründet in einem Vorgriff’*] (emphasis original) [hereinafter *Sein und Zeit*]. Note that there are still those who claim that ‘our situatedness is as immaterial to our theoretical enterprises as it is inevitable’: Larry Alexander, ‘Theory’s a What Comes Natchery’, (2000) 37 San Diego L.R. 777, p. 778. I owe this reference to Joanne Conaghan.

⁴⁹ Paul Feyerabend, *Farewell to Reason* (London: Verso, 1987), p. 116. For another argument to the effect that the history of philosophy in the west is the history of a philosophy of the same

however, is Plato's negative judgement on mimesis as ontologically derivative and debased.⁵⁰ Because only Courage is Courageous – because only the Idea is not anything else than what it is, because only the Idea is ultimately real – those who are courageous can attest only to an earthly manifestation of the quality of Courage. Accordingly, their courage is not identical to Courage; it is a mere copy or imitation of the Idea, a secondary term; it is different from Courage. Given that 'Platonism represents a preference for a stable and hierarchical world where neither persons nor things appear as other than they are',⁵¹ difference is inherently a failure, something negative, a malediction. Ultimately, for Plato, difference is a form of nothingness, since to differ from something is *not to be* like it.⁵²

A monistic model thus runs through the ethical tradition from the pre-Socratics to Plato but also from Kant to John Rawls. For all these philosophers, difference is understood as inferiority, a sign of pathology, a disease that only clear and ordered thinking can, should and will overcome.⁵³ Michel Foucault notes how 'one experiences a singular repugnance to think in terms of difference, to describe discrepancies and dispersions',⁵⁴ while Theodor Adorno observes that differences, whether 'actual or imagined', are regarded as 'stigmas indicating that *not enough has yet been done*'.⁵⁵ A related observation is Jean-François Lyotard's: 'If there are opponents, it is because humankind has not succeeded in realizing itself.'⁵⁶ Referring specifically to cultural diversity, Claude Lévi-Strauss writes that people

whose hidden purpose has always been to find a means to attenuate the shock of alterity, see Emmanuel Levinas, *En découvrant l'existence avec Husserl et Heidegger*, 3d ed. (Paris: Vrin, 2001), pp. 261–82 [1949].

⁵⁰ For a general discussion of Plato's hostility to reproductive art, see Iris Murdoch, *The Fire and the Sun: Why Plato Banished the Artists* (London: Chatto & Windus, 1977). See also Pierre-Maxime Schuhl, *Platon et l'art de son temps* (Paris: Félix Alcan, 1933). For a well-known illustration of Plato's refusal to accommodate difference, see his *Timaeus*, 35.

⁵¹ Paul Patton, *Deleuze and the Political* (London: Routledge, 2000), p. 33.

⁵² See generally Deleuze, *supra*, note 3, pp. 82–9, 165–8, 340–1 and 349–50.

⁵³ Indeed, for all their critical edge, even Heidegger's ontological analysis of 'Being' and Gadamer's reconciliative hermeneutics ultimately fail to escape this pattern. But see, for a very influential interpretation of Nietzsche as a philosopher of difference, Gilles Deleuze, *Nietzsche et la philosophie*, 3d ed. (Paris: Presses Universitaires de France, 1999) [1962].

⁵⁴ Michel Foucault, *L'archéologie du savoir* (Paris: Gallimard, 1969), p. 21 ['*on éprouv(e) une répugnance singulière à penser la différence, à décrire des écarts et des dispersions*'].

⁵⁵ Theodor Adorno, *Minima Moralia*, transl. by E. F. N. Jephcott (London: Verso, 1978), p. 103 [my emphasis]. For the original text, see *id.*, *Minima Moralia* (Berlin: Suhrkamp, 1951), p. 184 ['*Sie betrachtet die tatsächlichen oder eingebildeten Differenzen als Schandmale, die bezeugen, daß man es noch nicht weit genug gebracht hat*'].

⁵⁶ Jean-François Lyotard, *Le différend* (Paris: Editions de Minuit, 1983), p. 215 ['*s'il y a des adversaires, c'est que l'humanité n'est pas parvenue à sa réalisation*'].

have traditionally approached this phenomenon as ‘a kind of monstrosity or scandal’.⁵⁷ In the words of Michel Serres, ‘multiplicity [in the sense of diversity or difference] fosters anxiety and unity reassures.’⁵⁸ Turning briefly from philosophy to poetry – an alternative hermeneutic strategy – we see that Rilke captures the general idea in *The First Elegy*: ‘We are not very securely at home in the interpreted world.’⁵⁹ Nowadays, in fact, the discontent surrounding the notion of ‘difference’ can be stoked whenever its promotion is seen as subverting the proclaimed Enlightenment commitments to human emancipation and liberty or apprehended as suggesting a regression to a pre-Enlightenment cast of mind, which denied parity for all before the law, favoured exclusion based on status and extolled the mystifying authority of the forces of superstition and tyranny. Remember how, for Zweigert and Kötz, a finding of difference across laws denotes *inadequate research*.⁶⁰

* * *

Difference, of course, suggests a dimension unknown to the self, something like *das Unheimliche*. Difference belongs to thought’s unthought realm. Perhaps it even partakes in what thought cannot think. Difference lies beyond the self. It is vexatious, at times maddening. It threatens the death of the self even.⁶¹ And does difference not prohibit any relationship whatsoever?

⁵⁷ Claude Lévi-Strauss, *Race et histoire* (Paris: Albin Michel, 2001), p. 43 [‘une sorte de monstruosité ou de scandale’] (1952).

⁵⁸ Michel Serres, *Eloge de la philosophie en langue française* (Paris: Fayard, 1995), p. 270 [‘Le multiple propage l’angoisse et l’unité rassure’]. See also Dominique Schnapper, *La relation à l’autre* (Paris: Gallimard, 1998), p. 132: ‘the existence of dissonance being a source of uneasiness, it leads the individual to an activity aiming to reduce it’ [‘l’existence d’une dissonance étant source de malaise entraîne de la part de l’individu une activité qui vise à la réduire’].

⁵⁹ Rainer Maria Rilke, ‘The First Elegy’, in *The Essential Rilke*, transl. by Galway Kinnell and Hannah Liebmann (New York: Ecco Press, 2000), p. 77 [1923]. For the German text, see *id.*, p. 76: ‘wir nicht sehr verlässlich zu Haus sind in der gedeuteten Welt.’ I have modified the translation slightly.

⁶⁰ Zweigert and Kötz, *supra*, at text accompanying note 20. It should be observed, however, that even Enlightenment figures such as Diderot and Lessing forgo any unifying epistemology and, rather than desire pure insight into universal truth (the kind of claim which led Hegel to equate the work of abstraction with the work of death), promote the recognition of multiplicity and polyphony. For Hegel’s argument, see G. W. F. Hegel, *Phenomenology of Spirit*, transl. by A. V. Miller (Oxford: Oxford University Press, 1977), nos. 538–95, pp. 328–63 [1807]. For an illuminating commentary on the connections Hegel draws between Enlightenment and death, see James Schmidt, ‘Cabbage Heads and Gulps of Water’, (1998) 26 *Political Theory* 4, pp. 19–24. For an essay illustrating the link between ‘Enlightenment’ and ‘difference’, see Dena Goodman, ‘Difference: An Enlightenment Concept’, in Keith Michael Baker and Peter Hanns Reill (eds.), *What’s Left of Enlightenment?* (Stanford: Stanford University Press, 2001), pp. 129–47.

⁶¹ This language is not strictly metaphorical as is evidenced by a French contribution to a leading American law review appearing shortly after the First World War: ‘divergences in laws cause

In order to be neutralized, it must be erased. By silencing difference, often violently, the longing for universality, the quest for commonality based on some vague conception of the ontic sameness of people (perhaps nurtured by Christian cosmologies for which mankind is ultimately one and the same), allows the comparatist to circumvent the trauma that would otherwise present itself through the painful ‘reality’ of alternative and contrapuntal worlds: universality dispenses with differentiation. In profound contradiction with the fact that it is this differential ‘reality’ itself which invited comparative research into being in the first place and to which comparative legal studies, therefore, owes its very *raison d’être*, ‘the phantasm of the One charges the whole of politics with its furious, archaic, and terrifying energy.’⁶² The humanist ideal of *mastery* inherited from the Enlightenment favours, as an anti-psychosis strategy, the reduction of difference to sameness and legalizes the forgetting of difference in the name of sameness: the self consumes and nullifies alterity, which then shows itself to be merely instrumental to the satisfaction of desire (a pursuit not unrelated to apprehensions of truth and righteousness). Spinoza notes the self’s essential tendency to persist or to persevere in its being,⁶³ while Maurice Blanchot offers a related insight in contemporary – if somewhat less apodictic – terms: ‘It is tempting to attract the unknown to oneself, to desire to bind it through a sovereign decision; it is tempting, when one has power over that which is in the distance, to remain inside the house, to call

other divergences that generate unconsciously, bit by bit, these misunderstandings and conflicts among nations which end with blood and desolation’: Pierre Lepaulle, ‘The Function of Comparative Law’, (1921–2) 35 Harvard L.R. 838, p. 857. No doubt the same preoccupation animated the German comparatist Ernst Rabel as he prefaced the 1949 issue of his *Zeitschrift für ausländisches und internationales Privatrecht*, the first to appear since the end of the Second World War: ‘After such fearful turmoil our age requires more than ever that the west consolidate its law-making powers. We must work with renewed courage toward the reconciliation of needless differences, the facilitation of international trade and the improvement of private-law systems’: ‘Zum Geleit’, *Zeitschrift für ausländisches und internationales Privatrecht*, 1949–50, p. 1 [‘Mehr denn jemals, nach einem noch schrecklicheren Wirrsal, braucht unsere Zeit die Zusammenfassung der rechtsbildenden Kräfte des Abendlands. Beherzter als früher muß an der Ausgleichung grundloser Gegensätze, an der Erleichterung des internationalen Rechtsverkehrs, an der Verbesserung der Privatrechtssysteme gearbeitet werden’]. The point of the effacement of legal diversity becomes the taming of international tensions or, to put it more bluntly, the attenuation of the risk of war. The desire for the assimilation of other laws is thus linked to the fact that nationalist forms, which are associated with a territory, terrify. See Pierre Legendre, *Jouer du pouvoir: traité de la bureaucratie patriote* (Paris: Editions de Minuit, 1976), pp. 57 and 246.

⁶² Roger Dadoun, *La psychanalyse politique* (Paris: Presses Universitaires de France, 1995), p. 31 [‘le fantasme de l’Un charge tout le politique de sa furieuse, archaïque et terrorisante énergie’].

⁶³ *Ethica*, III, 6 [1677].

it there and to continue, in this way, to enjoy the quiet and familiarity of the house.’⁶⁴

* * *

Such attitudes are very apparent as civilians in mainland Europe try to come to terms with the common-law world through the civil-law’s time-honoured institutionalized forms of rationality and familiar conceptual grids – a reminder of these Odyssean journeys in which the peregrinations and adventures are but so many accidents on the way back home.⁶⁵ A German civilian, blithely experiencing the other as an imperfect approximation of himself, thus asks bluntly why can the common law not be civilian! Why, for instance, can the (deviant) English law not be like the law in Germany, where there prevails a ‘refined and liberal approach to statutory interpretation [which] constitutes a considerable advance in legal culture’? It is time for English law to learn the ‘lesson [which] has been learnt in Germany [and] which explains the great success of the German Civil Code’. And there is hope because the common law is, after all, not unlike the *Grundgesetz*. . .⁶⁶ Here is a reading betraying a strategy of hierarchization of

⁶⁴ Maurice Blanchot, *Celui qui ne m’accompagnait pas* (Paris: Gallimard, 1953), p. 152 [‘Il est tentant d’attirer à soi l’inconnu, de désirer le lier par une décision souveraine; il est tentant, quand on a le pouvoir sur le lointain, de rester à l’intérieur de la maison, de l’y appeler et de continuer, en cette approche, à jouir du calme et de la familiarité de la maison’].

⁶⁵ While civilians assert that the common law does not, ultimately, differ from the civil law (for example, see Reinhard Zimmermann, ‘Der europäische Charakter des englischen Rechts’, *Zeitschrift für Europäisches Privatrecht*, 1993, p. 4), one fails to encounter arguments by civilians to the effect that the civil law does not, in the end, differ from the common law. In point of fact, similarity by projection (projective identification), which consists in attributing features to another that one confers to oneself, is much more current than similarity by introjection (introjective identification) whereby the individual attributes to himself features that he attributes to another. The point is that individuals like to think that they differ from others more than others differ from them and that others resemble them more than they resemble others. Concretely, this means that the individual accepts better the idea that others belong to his category while he would rebel at the thought that he belongs to the others’. See Geneviève Vinsonneau, ‘Appartenances culturelles, inégalités sociales et procédés cognitifs en jeu dans les comparaisons inter-personnelles’, *Bulletin de Psychologie*, 1994, No. 419, p. 422. For a general reflection on ‘epistemic self-privileging’ or ‘epistemic asymmetry’ (that is, the conviction that the self is enlightened and that the other is benighted), see Barbara Herrnstein Smith, *Belief and Resistance* (Cambridge, Mass.: Harvard University Press, 1997), p. xvi.

⁶⁶ Reinhard Zimmermann, ‘*Statuta sunt stricte interpretanda?* Statutes and the Common Law: A Continental Perspective’, [1997] *Cambridge L.J.* 315, pp. 321, 326 and 328, respectively. As a German academic asserts such anti-particularism, he is also giving effect to the nineteenth-century view that ‘[o]nly by transcending what distinguished Swabia from Prussia, or Bavaria from Schleswig-Holstein, could Germany become, in law as in ideology, one.’ This quotation is from W. T. Murphy, *The Oldest Social Science?* (Oxford: Oxford University Press, 1997), p. 44, n. 22. For a further illustration of strong German ethnocentrism, see Reinhard Zimmermann,

governmentalities, evidencing a determination to disavow difference and disclosing a will to power which, in failing to specify the confines of its own locus of enunciation, proceeds to individualize otherness as the discovery of its own assumptions. The other is methodologically 'admitted' as another in so far, and in so far only, as he proves compatible with the comparatist's ontological premises.

* * *

Even leaving to one side the critique by eighteenth-century thinkers such as Hamann, Vico and Herder, who decried Enlightenment attempts to override feelings of distinctiveness based on national identity, language, history and culture, there is an important sense, harking back to Hegelian historicism and anti-transcendentalism, in which the Enlightenment project can be said, through its exhilarating quest for power over nature and the world, to have fostered the abandonment of the search for meaning, the commodification of knowledge, the bureaucratization of the *Lebenswelt*, the marginalization of human experience and the disqualification of ethics.⁶⁷ Indeed, the sameness across jurisdictions which most comparative research automatically postulates and then seeks to elucidate is *necessarily* based on a repression of pertinent differences located in the contextual matrixes within which instantiations of posited law are inevitably ensconced. In other words,

'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', (1996) 112 L.Q.R. 576, where the author goes so far as to suggest as an inspirational model for European academics a law professor whose (German) nationalistic historicism was always inimical to comparative legal studies, as underlined in Ernst Landsberg, *Geschichte der Deutschen Rechtswissenschaft*, vol. III, t. 2 (Munich: R. Oldenbourg, 1910), pp. 207–17, and whose abiding commitment lay with the institution of a Romanist *Rechtsstaat* in Germany, as shown in James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton University Press, 1990). For general evidence supporting the view that German academics tend to address European matters as if *German* history was repeating itself, see John Laughland, *The Tainted Source* (London: Little, Brown, 1997), pp. 22–3, 26, 31–3, 110–11, 116–17, 120 and 137. However, there is little in common between a situation where political power required to suppress pluralism in order to assert its authority and another where the dynamics of market integration assumes pluralism (indeed, the fundamental tenets underlying the Treaty of Rome are that there should be an opening of economic borders within the European Community; that the Member States should recognize each other's law and that 'market citizens' should have the opportunity to select the legal regulation that best suits them).

⁶⁷ See Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment*, transl. by John Cumming (London: Verso, 1997), pp. 3–42 [1944]. For the original text, see *id.*, *Dialektik der Aufklärung* (Frankfurt: S. Fischer, 1969), pp. 9–49. See also Alasdair MacIntyre, *After Virtue*, 2d ed. (London: Duckworth, 1985), pp. 51–61; Stephen Toulmin, *Cosmopolis* (Chicago: University of Chicago Press, 1990), p. 201 and *passim*. For a helpful consideration of the work of Hamann, Vico and Herder, see Isaiah Berlin, *Three Critics of the Enlightenment*, ed. by Henry Hardy (Princeton: Princeton University Press, 2000).

the specification of sameness can only be achieved if the historico-socio-cultural dimensions are artificially excluded from the analytical framework as is done, for instance, by the proponents of 'common-core' research, who confine their work to what they regard as being acceptably legal.⁶⁸ I agree with George Fletcher's observation: 'common-core' research, as it purports to exhume the treasures of the law, all these sadly buried commonalities, is 'a way of thinking designed to suppress difference. It purchases a sense of universality in law but only at the price of the ideas and arguments that make the law a worthy creation of the human intellect.'⁶⁹ This is to say that the creation and maintenance of homogeneity across a range of posited laws must be apprehended as a demonstrably artificial enterprise: 'homogeneity [...] is always revealed as fictitious and based on acts of exclusion', which are an inseparable concomitant of every uniformization process.⁷⁰ As a matter of fact, the deliberate character which this suppression of information may adopt has been openly acknowledged.⁷¹ Only something like *interpretive closure* – what one might call 'cost-effective reasoning' – can reduce to sameness what is, and should, for the sake of the integrity of the comparative enterprise, remain different. (Needless to add, anything

⁶⁸ For a critique of Schlesinger's endeavours, see William Ewald, 'Comparative Jurisprudence (I): What Was it Like to Try a Rat?', (1995) 143 U. Pennsylvania L.R. 1889, pp. 1978–82 and 2081, who notes how this project arose from 'a rather crude philosophical picture that seems to appeal to legal scholars when they attempt to serve what they imagine to be the practical needs of corporate attorneys' (p. 2081). A variation on the theme of 'common-core' research is offered by the *International Encyclopedia of Comparative Law* (Tübingen: J. C. B. Mohr, 1971–). For a critical introduction to this venture, see Ewald, *supra*, pp. 1978–84.

⁶⁹ George P. Fletcher, 'Comparative Law as a Subversive Discipline', (1998) 46 Am. J. Comp. L. 683, p. 694. See also Ian Ward, 'The Limits of Comparativism: Lessons from UK–EC', (1995) 2 Maastricht J. Eur. & Comp. L. 23, p. 31: 'It is undeniable [...] that in the European scenario, comparative law, at both micro and macro levels, is being used as a means of effecting sameness and suppressing difference.'

⁷⁰ Chantal Mouffe, 'Democracy, Power, and the "Political"', in Seyla Benhabib (ed.), *Democracy and Difference* (Princeton: Princeton University Press, 1996), p. 246. See also Bachelard, *supra*, note 37, p. 114: 'The communion of minds is achieved through negation' [*La communion des esprits se réalise dans la négation*].

⁷¹ See Markesinis, *supra*, at text accompanying note 27. An application of the duplicitous strategy advocated by Markesinis is seemingly offered in van Gerven *et al.*, *supra*, note 25, p. 44, where it is asserted that 'English law has *followed* Roman law longer than the Continental legal systems by retaining specific heads of tortious liability, each of which was originally covered by a different "writ"' [my emphasis]. But the historical fact of nominate torts in English law has nothing to do with 'following' Roman law as is shown, for instance, in D. J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999). Here is the kind of irresponsible simplification that is engendered by a frenetic and hasty search for commonalities-which-clearly-must-be-there-since-we-want-them-there.

along the lines of 'homogenized law' remains entangled in the philosophy of the subject for it is the comparatist, situated in his concrete context and armed with his own interpretive schemes, who determines the meaning of utterances and provides the 'reconstruction' of rules.)

The fact that difference inheres to any identitarian endeavour and that its silencing must, therefore, assume deliberate effacement can be asserted from a more distinctly philosophical perspective. The fundamental argument is that *in effect* identity requires difference in order to assume its being. Identity, because it is a relation, demands, as the condition of its very existence, the existence of a non-identity that exists outside of it. Only the existence of non-identity allows identity to exist as identity, which is to say that identity owes its existence to non-identity, that it takes its being from non-identity or difference. It follows that difference can then be understood not only as somehow 'consubstantial' with identity, but as enjoying a measure of primordality over identity because it is what allows identity to be itself. Thus, the concept 'cat' (an identity) requires 'cats' in order to exist: cats must come first so as to provoke the mind into conceptualization. The limitations inherent in the 'concept' are illustrated by Vincent Descombes drawing on Kant's example of the 100 *thalers*. In sum, Kant's point is that there is nothing more in the real *thalers* than in the possible *thalers*. The 100 *thalers* I am complaining of not having are the same as the 100 *thalers* that I wish I had in my pocket. These *thalers*, if they ever come to my pocket, will be exactly those whose presence I wanted. The passage from the possible to the real does not, therefore, modify the concept. Be that as it may, there is an important difference between having and not having the 100 *thalers*, between a presence and an absence. What Kant's argument shows us is that the concept is indifferent to this difference and that what ultimately matters – existence or non-existence – requires a site of enunciation that is located beyond the concept.⁷² Another example allows a return to the fact of sequential theatrical performances. The first night cannot be the first night if there is not after it the second night. Thus, the second night is not just what comes after the first night, but it is what allows the first night to be the first night. The first night cannot be the first night 'on its own', so to speak, but requires primordial help from the second night. It is through the second night that the first night is first. The second night, therefore, enjoys

⁷² See Vincent Descombes, *Le même et l'autre* (Paris: Editions de Minuit, 1979), pp. 32–3. The 'thaler' is a large silver coin current in the German states from the sixteenth century. In English, the word was modified to 'dollar' before 1600.

a kind of priority over the first night in the sense that it exists right from the start as the prerequisite to the firstness of the first night.⁷³

Emmanuel Levinas observes that the other always exceeds the idea of the other in me, that the other can never be cognitively or emotionally mastered, that the other is ultimately independent from my initiative and power, that the other interrupts the self on a primordial level, that the other suppresses the self as a subject of experience (what the other experiences lies beyond the self), that the other is, in this sense, transcendent, that it assumes *priority* over the self.⁷⁴ 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, whom it summons to emancipation or deterritorialization,⁷⁵ responsibility or response. A challenge to the subject's omniscience, it acts as a governing postulate for comparative analysis, helping it to move away from logocentric postulates where '[w]hat counts for the purpose of comparison is the fact of a solution and not the ideas, concepts, or legal arguments that support the solution.'⁷⁶ The habitual position is, of course, that '[i]f on a given set of facts the victim of an accident in a friend's apartment can recover damages from the landlord, the fact of recovery overwhelms, in significance, the rationale for the decision. As compared with the hard fact of wealth transferring from one party to the other, the ideas and arguments explaining the flow are of little significance.'⁷⁷ It is such reductionism which the comparatist must avoid as he appreciates that raw solutions cannot exhaust the extension of the concept 'law'.⁷⁸ Specifically, the redaction of an account

⁷³ See *id.*, p. 170. Cf. Jacques Derrida, *La voix et le phénomène*, 2d ed. (Paris: Presses Universitaires de France, 1998), p. 95: 'the same is only the same by being sensitive to the other' ['*le même n'est le même qu'en s'affectant de l'autre*']. For Benjamin, the perception of similarities is derivative behaviour: Walter Benjamin, 'On the Mimetic Faculty', in *Selected Writings*, ed. by Michael W. Jennings, Howard Eiland and Gary Smith and transl. by Edmund Jephcott, vol. II: 1927–1934 (Cambridge, Mass.: Harvard University Press, 1999), p. 720 [1933]. For the original text, see *id.*, 'Über das mimetische Vermögen', in *Gesammelte Schriften*, ed. by Rolf Tiedemann and Hermann Schweppenhäuser, vol. II, t. 1 (Frankfurt: Suhrkamp, 1977), p. 210.

⁷⁴ See Emmanuel Levinas, *Totalité et infini* (Paris: Le Livre de Poche, [n.d.]), pp. 39–45 [1971].

⁷⁵ Cf. Jürgen Habermas, *Knowledge and Human Interests* (Boston: Beacon Press, 1987), pp. 302–17, who develops the notion of 'emancipatory interest'. The German formulation is '*emanzipatorische Erkenntnisinteresse*': *id.*, *Technik und Wissenschaft als 'Ideologie'* (Frankfurt: Suhrkamp, 1971), p. 155. For the idea of 'deterritorialization', see Gilles Deleuze and Félix Guattari, *Mille plateaux* (Paris: Editions de Minuit, 1980), pp. 381–433 ['*déterritorialisation*'].

⁷⁶ George P. Fletcher, 'The Universal and the Particular in Legal Discourse', [1987] Brigham Young U. L.R. 335, p. 335.

⁷⁷ *Ibid.*

⁷⁸ For a sensitive exploration of the conceptual extension of 'law' by a discerning comparatist, see Nicholas Kasirer, 'Honour Bound', (2001) 47 McGill L. J. 237. But cf. Ugo Mattei, 'Three

which will not prove unduly distortive of the law being considered must attend to recurrently emergent, relatively stable, institutionally reinforced social practices and discursive modalities (a certain lexicon, a certain range of intellectual or rhetorical themes, a certain set of logical or conceptual moves, a certain emotional register) acquired by the members of a community through social interaction and experienced by them as generalized tendencies and educated expectations congruent with their conception of justice.⁷⁹ And this task is greatly facilitated as the anticipation of sameness geared to an examination conducted on the surface level of the posited law recedes into the background to make way for receptivity to the radical epistemological diversity that undergirds the posited law's answers across legal communities and legal traditions.

Cartesianism introduces the *cogito* as an absolute with everything else (including the other) being made relative to it. The being of the other is made equivalent to the being as it is known by the *cogito* (which is another way of saying that the being of the other is made subservient to the self, who controls it). I argue that the challenge for comparative legal studies is thus to position itself as an heir to the Counter-Enlightenment – to borrow Isaiah Berlin's expression⁸⁰ – and to exhibit elective affinities with idealism, relativism, historicism and the politics of authenticity, identity and recognition.⁸¹ In other words, I argue that comparative legal studies, in order to overcome the epistemological barrier to knowledge which its logocentric practices have conspired to erect, must operate a Bachelardian *epistemological break*.⁸²

* * *

This claim warrants some elaboration as regards the relationship of the thesis I defend with Counter-Enlightenment critique, at least in so far as

Patterns of Law: Taxonomy and Change in the World's Legal Systems', (1997) 45 Am. J. Comp. L. 5, p. 13, n. 37: 'I do not wish to enter into the largely sterile and boring discussion of what can be considered law.'

⁷⁹ I closely follow Smith, *supra*, note 65, p. 92.

⁸⁰ Isaiah Berlin, 'The Counter-Enlightenment', in *Against the Current*, ed. by Henry Hardy (London: Hogarth Press, 1979), pp. 1–24.

⁸¹ In this respect, Bachelard's critique of the reductionism inherent to Cartesian thought remains invaluable: *supra*, note 37, pp. 139–83. For a helpful commentary, see Mary Tiles, *Bachelard: Science and Objectivity* (Cambridge: Cambridge University Press, 1984), pp. 28–65.

⁸² Bachelard writes that 'one knows *against* prior knowledge': Gaston Bachelard, *La formation de l'esprit scientifique*, 14th ed. (Paris: Vrin, 1989), p. 14 ['*on connaît contre une connaissance antérieure*'] (emphasis original) [1938]. I note that in his contribution to this book, Upendra Baxi, for reasons not wholly unrelated to mine, also calls on comparatists-at-law to perform an epistemological rupture.

the connection with Johann Gottfried Herder's arguments is concerned. I think that an important point must be emphasized at the outset. The fact that twentieth-century racist writers (such as various Nazi ideologues) have appealed to Herder's ideas and invested them with xenophobic and anti-Semitic content cannot be taken to establish that Herder's views were inherently racist. Indeed, when one turns to Herder's programmatic texts and, in particular, to his *Auch eine Philosophie der Geschichte zur Bildung der Menschheit*,⁸³ one very much finds a variation on the theme of cultural essentialism rather than a theory of evolutionary racialism. In his thorough intellectual history of the relationship between Herder and Kant – Herder was Kant's favourite pupil in Königsberg between 1762 and 1764 and the two eventually formed a close intellectual friendship marked by mutual admiration before diverging when the mature Herder began to express views which his former master could not accept – John Zammito observes that '[Herder's] thoughts on the physical anthropology of race are, for modern eyes, vastly less painful than Kant's.'⁸⁴ He adds that, contrary to Kant, 'Herder was skeptical of the fixture of distinct racial groups, precisely for the fear that this would lead to hypostasis of distinctions in their capacities.'⁸⁵ While Herder may have been guilty of expressing 'cultural contempt', say, toward the Chinese, he never engaged in 'Kant's biological disqualification of non-Western peoples'.⁸⁶ In his *Ideen zur Philosophie der Geschichte der Menschheit*,⁸⁷ Herder, in fact, explicitly denies the word 'race'

⁸³ Johann Gottfried Herder, *Auch eine Philosophie der Geschichte zur Bildung der Menschheit*, in *Werke in zehn Bänden*, vol. I: *Schriften zu Philosophie, Literatur, Kunst und Altertum 1774–1787*, ed. by Jürgen Brummack and Martin Bollacher (Frankfurt: Deutscher Klassiker Verlag, 1994), pp. 9–107 [1774]. For an abridged English translation, see *id.*, *Yet Another Philosophy of History*, in *J. G. Herder on Social and Political Culture*, ed. and transl. by F. M. Barnard (Cambridge: Cambridge University Press, 1969), pp. 179–223 [hereinafter *Herder on Culture*].

⁸⁴ John H. Zammito, *Kant, Herder, and the Birth of Anthropology* (Chicago: University of Chicago Press, 2002), p. 345.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* [emphasis original]. For a further exploration of the significant differences between Kant and Herder with respect to the notion of 'race', see Robert Bernasconi, 'Who Invented the Concept of Race? Kant's Role in the Enlightenment Construction of Race', in *id.* (ed.), *Race* (Oxford: Blackwell, 2001), pp. 11–36. For an examination of Kant's absolutization of racial difference, see Mark Larrimore, 'Sublime Waste: Kant on the Destiny of the "Races"', *Canadian J. Phil.*, 1999, Suppl. Vol. 25, pp. 99–125.

⁸⁷ Johann Gottfried Herder, *Ideen zur Philosophie der Geschichte der Menschheit*, in *Werke in zehn Bänden*, vol. VI, ed. by Martin Bollacher (Frankfurt: Deutscher Klassiker Verlag, 1989) [1784–91]. For a contemporary (albeit abridged) English translation, see *id.*, *Reflections on the Philosophy of the History of Mankind*, ed. by Frank E. Manuel (Chicago: University of Chicago Press, 1968).

and rejects the existence of 'races'.⁸⁸ Accordingly, H. B. Nisbet, one of the leading students of Herder's thought, remarks that 'although Herder was prepared to classify races aesthetically, he believed that they cannot be classified anthropologically, since he realised (quite correctly, according to most present-day theorists) that racial differences in man are only superficial. Thus, those who, during the Nazi era, used Herder's aesthetic classification to suggest that he considered certain races as anthropologically superior to others, were quite mistaken.'⁸⁹ Indeed, Herder's concern for the plight of oppressed black communities – which he expressed, in particular, through his poetry – has been documented in detail.⁹⁰ Even less sanguine critics conclude that Herder cannot, ultimately, be held accountable for the subsequent perversion of his thought: 'The truth of the matter was that Herder's ideas were too heady a mixture for a people who were inexperienced in politics and who, as [the poet Heinrich] Heine pointed out, lived in dreams rather than realities.'⁹¹

Of course, this is not to say that every feature of Herder's new hermeneutic historicism deserves support. Specifically, to the extent that Herder apprehended national communities as constituting organic wholes, I would dissent – although it is not at all clear that Herder's claim in this respect was ever as emphatic as is often assumed.⁹² Nor would I accept the idea that communities are driven by an inner spiritual force; indeed, I cannot find any merit to the hylozoist view of a unifying psychological essence, such as *Volksgeist* (which makes me suspicious also of anything along the lines of

⁸⁸ See Larrimore, *supra*, note 86, p. 106. See also Bernasconi, *supra*, note 86, pp. 28–9.

⁸⁹ H. B. Nisbet, *Herder and the Philosophy and History of Science* (Cambridge: Modern Humanities Research Association, 1970), p. 230. See also Gerald Broce, 'Herder and Ethnography', (1986) 22 *J. Hist. Behavioral Sciences* 150, p. 164.

⁹⁰ See Ingeborg Solbrig, 'Herder and the "Harlem Renaissance" of Black Culture in America: The Case of the "Neger-Idyllen"', in Kurt Mueller-Vollmer (ed.), *Herder Today* (Berlin: Walter de Gruyter, 1990), pp. 402–14. The author underlines the positive impact of Herder's thought on contemporary African-American studies.

⁹¹ Gordon A. Craig, 'Herder: The Legacy', in Kurt Mueller-Vollmer (ed.), *Herder Today* (Berlin: Walter de Gruyter, 1990), p. 25. For more on Heine's views of German culture, see Nigel Reeves, *Heinrich Heine: Poetry and Politics* (Oxford: Oxford University Press, 1974).

⁹² See Vicki A. Spencer, 'Difference and Unity: Herder's Concept of *Volk* and Its Relevance for Contemporary Multicultural Societies', in Regine Otto (ed.), *Nationen und Kulturen* (Würzburg: Königshausen & Neumann, 1996), pp. 296–9, where the author observes that, for Herder, 'a community's culture [...] is a heterogeneous rather than a homogeneous entity' (p. 296) and notes that Herder 'does not mistakenly think a community's culture is a uniform body with all its parts changing in unison' (p. 297). Rather, 'a community's culture [is] the outcome of a complicated interaction of various environmental forces, individual powers, specific activities and different attitudes' (*ibid.*).

Wilhelm von Humboldt's notion of '*Nationalcharakter*', as outlined in his *Plan einer vergleichenden Anthropologie*).⁹³ I cannot subscribe to the idea of some external or metaphysical forces deterministically acting upon individuals: culture is but the expression of individuals thinking about their world and acting to change it (on the understanding that their past functions as a condition of possibility, which limits what it constitutes). Nor would I agree, therefore, that the individual is insignificant in the context of historical processes of diffusion and accretion or sedimentation of cultural traits.⁹⁴ But the work of writers like Herder and Humboldt can hardly be reduced to *Volksgeist* and *Volksgeister*, to *Nationalcharakter* and *Nationalcharakteren*.

Crucially, these authors contest the Kantian enterprise of a transcendental grounding of reason: universality of human reason across space and time yields to an empirical apprehension of space and time grounded in lived experience (*Erfahrung*). Herder and Humboldt claim that morality is acquired through formal and informal enculturation. The interpreter must, therefore, rather than engage in the construction of elaborate rationalizing systems, attend to the specificity of historical processes with a view to making each factual configuration intelligible in terms of its particular context. In a letter dated 31 October 1767, Herder indeed writes as follows: 'Nothing makes me sicker than the arch-error of the Germans, to build systems.'⁹⁵ Rather than formal logic, Herder wishes to stress human sensibility. His goal is to grasp the character of human knowledge. Herder regards the human mind as constitutive of the world of experience, of the reality that is the focus of cognition,⁹⁶ which leads him to emphasize the perspectival nature

⁹³ Wilhelm von Humboldt, *Plan einer vergleichenden Anthropologie*, in *Werke*, ed. by Albert Leitzmann, vol. I: 1785–1795 (Berlin: B. Behr's Verlag, 1903), pp. 377–410 [1795].

⁹⁴ Cf. Zygmunt Bauman and Keith Tester, *Conversations with Zygmunt Bauman* (Cambridge: Polity, 2001), p. 32: 'Culture is a *permanent revolution* of sorts. To say "culture" is to make another attempt to account for the fact that the human world (the world moulded by the humans and the world which moulds the humans) is perpetually, unavoidably and unremediably *noch nicht geworden* (not-yet-accomplished)' [emphasis original]. The words are Bauman's, referring to Ernst Bloch. They connect to the wider phenomenon of 'detraditionalization'. See generally Paul Heelas, Scott Lash and Paul Morris (eds.), *Detraditionalization* (Oxford: Blackwell, 1996).

⁹⁵ Johann Gottfried Herder, *Briefe: Gesamtausgabe 1763–1803*, vol. I: *April 1763–April 1771*, ed. by Wilhelm Dobbek and Günter Arnold (Weimar: Hermann Böhlaus Nachfolger, 1977), p. 92 ['*Vor nichts aber graut mir mehr, als vor dem Erbfehler der Deutschen, Systeme zu zimmern*'].

⁹⁶ The primacy which Herder grants *poiesis* in the constitution of reality makes him a forerunner of Heidegger and Wittgenstein. For these and other epistemological connections, see Michael Morton, 'Changing the Subject: Herder and the Reorientation of Philosophy', in Kurt Mueller-Vollmer (ed.), *Herder Today* (Berlin: Walter de Gruyter, 1990), pp. 158–72.

of human understanding and generally to highlight the situatedness of cultural forms. According to Ernest Menze, 'Herder's historical relativism was his most important achievement.'⁹⁷

Given that Herder is often portrayed as a rabid nationalist, it may be worth insisting that his intellectual outlook was, in fact, most cosmopolitan. For instance, he expressly acknowledged his intellectual debt to Francis Bacon's empiricism. In a 1764 poem, 'Erhebung und Verlangen', Herder thus recounted his intellectual journey in these terms: 'and listened to Kant/And drifted sideways after Bacon.'⁹⁸ Indeed, 'it was chiefly to Bacon, with his *commercium mentis et rei*, that [Herder] looked as his *theoretical* guide.'⁹⁹ Moreover, Herder drew inspiration from David Hume, in particular from his *The History of Great Britain*.¹⁰⁰ Hume's pragmatism exercised a deep influence over Herder, who repeatedly praised him as the greatest historian of the day.¹⁰¹ Specifically, Herder saluted Hume's scrupulous sense of historicity and welcomed the fact that, rather than fall for arid and oppressive judgements about superficial commonalities, Hume held that 'every class, every way of life has its own mores.'¹⁰² One could easily supply other

⁹⁷ Ernest A. Menze, 'Königsberg and Riga: The Genesis and Significance of Herder's Historical Thought', in Kurt Mueller-Vollmer (ed.), *Herder Today* (Berlin: Walter de Gruyter, 1990), p. 98. See also Dagmar Barnouw, 'Political Correctness in the 1780s: Kant, Herder, Forster and the Knowledge of Diversity', *Herder Jahrbuch 1994*, ed. by Wilfried Malsch (Stuttgart: J. B. Metzler, 1994), p. 57.

⁹⁸ Johann Gottfried Herder, 'Erhebung und Verlangen', in *Werke in zehn Bänden*, vol. III: *Volkslieder, Übertragungen, Dichtungen*, ed. by Ulrich Gaier (Frankfurt: Deutscher Klassiker Verlag, 1990), p. 778 ['und hörte Kant! (. . .)/Und irrte seitwärts Baco nach!'] (1774).

⁹⁹ H. B. Nisbet, 'Herder and Francis Bacon', (1967) 62 *Modern Language R.* 267, p. 271 [emphasis original].

¹⁰⁰ David Hume's *The History of Great Britain* appeared in six volumes between 1754 and 1762. It has become known as *The History of England From the Invasion of Julius Caesar to the Revolution in 1688*. For a current facsimile edition of the 1778 version, the last to have been revised by Hume himself, see David Hume, *The History of England* (Indianapolis: Liberty Fund, 1985), 6 vols.

¹⁰¹ For example, see Johann Gottfried Herder, 'On the Transformation of the Taste of Nations in the Course of the Ages', in *Selected Early Works 1764–1767*, ed. by Ernest A. Menze and Karl Menges and transl. by Ernest A. Menze and Michael Palma (University Park: Pennsylvania State University Press, 1992), p. 66 [1766].

¹⁰² *Id.*, *Journal meiner Reise im Jahr 1769*, in *Werke in zehn Bänden*, vol. IX, t. 2, ed. by Rainer Wisbert (Frankfurt: Deutscher Klassiker Verlag, 1997), p. 27 ['Jeder Stand, jede Lebensart hat ihre eignen Sitten'] (1810) [hereinafter *Journal meiner Reise*]. For an abridged English translation, see *id.*, *Journal of my Voyage in the Year 1769*, in *Herder on Culture*, *supra*, note 83, p. 76 [hereinafter *Journal of my Voyage*]. See also Amy R. McCready, 'Herder's Theory of Cultural Diversity and Its Postmodern Relative', in Regine Otto (ed.), *Nationen und Kulturen* (Würzburg: Königshausen & Neumann, 1996), p. 191: 'instead of the antagonism that has characterized cultural relations throughout history, adulation marks Herder's descriptions of other times and places. Herder is

illustrations of Herder's cosmopolitanism, such as his noted essay on Shakespeare, where he aimed to 'explain him, feel him *as he is*, use him, and – *if possible* – make him alive [...] in Germany'.¹⁰³ Indeed, this passage is revealing of Herder's general openness of mind. Thus, he expressed his abiding cultural ambition in these terms: 'to our Leibnizes [to add] the Shaftesburys and Lockes, to our Spaldings the Sternes, Fosters, and Richardsons, to our Moses [Mendelssohn], the Browns and Montesquieus.'¹⁰⁴ A significant component of Herder's nationalism, therefore, involved the '[assimilation] into a nascent German culture [of] the best of French and British thought'.¹⁰⁵

To Herder, concern for particularism was perfectly compatible with a cosmopolitan outlook – he himself referred at length to the idea of '*Humanität*' – this common bond of humanity being expressed in the diversity rather than in the sameness of human forms.¹⁰⁶ The point is worth reiterating: 'There was nothing political about Herder's views about belonging. He had little interest in politics and its manifestations and forms. He hated

fascinated with human diversity, and this fascination is reflected in both his method of inquiry and the subjects of his research.'

¹⁰³ Johann Gottfried Herder, 'Shakespeare', in *Eighteenth Century German Criticism*, ed. by Timothy J. Chamberlain (New York: Continuum, 1992), p. 143 [my emphasis] (1773). The translation from the German is by Joyce P. Crick and H. B. Nisbet. The German text, which initially appeared as part of the *Sturm und Drang* manifesto, reads as follows: 'zu erklären, zu fühlen wie er ist, zu nützen, und – wo möglich! – uns Deutschen herzustellen.' For an edition of the manifesto, see *Von Deutscher Art und Kunst* (Stuttgart: G. J. Göschen'sche Verlagshandlung, 1892). The relevant passage is on p. 53. See generally Zammito, *supra*, note 84, pp. 342–4. See also Robert S. Mayo, *Herder and the Beginnings of Comparative Literature* (Chapel Hill: University of North Carolina Press, 1969).

¹⁰⁴ Herder, *Journal meiner Reise*, *supra*, note 102, p. 33. This passage is omitted in *Journal of my Voyage*, *supra*, note 102. I have used the translation in Zammito, *supra*, note 84, pp. 314–15.

¹⁰⁵ Zammito, *supra*, note 84, p. 315.

¹⁰⁶ According to Herder, even such a notion as '*Humanität*', though, retains its concrete character. This point is well captured in Benjamin Bennett, *Beyond Theory: Eighteenth-Century German Literature and the Poetics of Irony* (Ithaca: Cornell University Press, 1993), p. 259, where the author observes that, for Herder, 'our being is indistinguishable from our being-human, and that our being-human, in turn, our "*Humanität*", our existence, experience, and history, is exactly coextensive with the invention, operation, and development of language'. See generally Johann Gottfried Herder, *Briefe zu Beförderung der Humanität*, in *Werke in zehn Bänden*, vol. VII, ed. by Hans-Dietrich Irmscher (Frankfurt: Deutscher Klassiker Verlag, 1991), pp. 147–53 [being letters 27 and 28] (1794) [hereinafter *Humanität*]. For an English translation of the relevant letters, see *On World History: Johann Gottfried Herder – An Anthology*, ed. by Hans Adler and Ernest A. Menze and transl. by Ernest A. Menze and Michael Palma (Armonk, New York: M. E. Sharpe, 1997), pp. 105–9. See also Samson B. Knoll, 'Herder's Concept of *Humanität*', in Wulf Koepke (ed.), *Johann Gottfried Herder: Innovator Through the Ages* (Bonn: Bouvier, 1992), pp. 9–19; A. Gillies, *Herder* (Oxford: Blackwell, 1945), pp. 97–113. For a thorough exploration in German, see 'Herders Verständnis von "*Humanität*"', being part of the commentary ('Kommentar') in *Humanität*, *supra*, pp. 817–37.

centralization, coercion, regulation, imperialism, all of which he associated with the State, a favorite target of his invectives. *His nationalism was not political but cultural.*¹⁰⁷ In sum, Herder, ‘the complete anthropologist’,¹⁰⁸ was among the most sensitive, culturally aware and creative respondents to the challenge posed by European expansion and its corollary, the contact with strange cultures. ‘Herder stresse[d] the necessity for any adequate understanding of the diverse cultures of human history to grasp the distinctive assumptions and prejudices implicit in the cultural consciousness of any given national community.’¹⁰⁹ Along the same lines, in his *Über die Aufgabe des Geschichtschreibers*, Wilhelm von Humboldt argued that the ultimate goal of the interpreter must be ‘understanding’ (‘*Verstehen*’),¹¹⁰ which calls for a fundamental appreciation of the ‘abilities, feelings, dispositions and desires’ (‘*Fähigkeiten, Empfindungen, Neigungen und Leidenschaften*’) of individuals as agents of history.¹¹¹ In my view, the contemporary relevance of the historicist critique of Enlightenment rationalism and of its claim to transhistorical and supracultural rationality very much lies in its strong defence of a pluralistic and non-hierarchical approach to a brand of cultural studies acknowledging the contingency and finitude of individuals and, therefore, underlying the relevance of gnoseological studies (understood in the broadest sense and including, for example, empirical psychology).¹¹²

* * *

Comparatists-at-law must, therefore, reverse the intellectual movement which subordinates difference to identity and emulate Wittgenstein, who said: ‘my interest is in shewing that things which look the same are really different.’¹¹³ To quote Günter Frankenberg, ‘[a]nalogies and the

¹⁰⁷ Craig, *supra*, note 91, p. 24 [my emphasis].

¹⁰⁸ Zammito, *supra*, note 84, p. 344. See also *id.*, p. 475, n. 33.

¹⁰⁹ Brian J. Whitton, ‘Herder’s Critique of the Enlightenment: Cultural Community Versus Cosmopolitan Rationalism’, (1988) 27 *Hist. & Theory* 146, p. 154.

¹¹⁰ Wilhelm von Humboldt, *Über die Aufgabe des Geschichtschreibers*, in *Werke*, ed. by Albert Leitzmann, vol. IV: 1820–1822, (Berlin: B. Behr’s Verlag, 1905), pp. 38 and 41 [1821].

¹¹¹ *Id.*, p. 49. Herder also insisted on the importance of sentiments. See McCready, *supra*, note 102, pp. 191–2.

¹¹² For a summary of Herder’s contribution to philosophical thought, see the ‘nine theses’ submitted by Robert S. Leventhal, *The Disciplines of Interpretation* (Berlin: Walter de Gruyter, 1994), pp. 230–4. In the light of Leventhal’s excursus, I am minded to address the question which James Whitman puts in his contribution to this book by voicing a somewhat emphatic ‘oui’. Cf. Charles Taylor, ‘The Importance of Herder’, in *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995), pp. 79–99.

¹¹³ M. O’C. Drury, ‘Conversations with Wittgenstein’, in Rush Rees (ed.), *Ludwig Wittgenstein: Personal Recollections* (Oxford: Blackwell, 1981), p. 171 [1948].

presumption of similarity have to be abandoned for a rigorous experience of distance and difference.¹¹⁴ I claim that comparison must involve a *principium individuationis*, 'the primary and fundamental investigation of difference'.¹¹⁵ Likewise, Else Øyen remarks that the time has come for comparative research 'to shift its emphasis from seeking uniformity among variety to studying the preservation of enclaves of uniqueness among growing homogeneity and uniformity'.¹¹⁶ Comparative legal studies must 'recognize and lay out a space of the other within the law. It is a question of identifying the conditions of difference, the places, occasions, energies, and institutional focuses within which difference, as difference, can appear or the other speak'.¹¹⁷ Ascribing meaning to a legal culture or tradition means 'finding what is significant in [its] difference from others'.¹¹⁸ This strategy, in turn, assumes a susceptibility to alterity on the part of the comparatist even prior to the inception of the comparative investigation. In this sense, a respect for alterity is not so much the result of a quest for difference as it is its pre-requisite.

* * *

By contrast, the insistence on a unitary conceptual matrix can lead to remarkable claims. James Gordley, who tells us that 'there is no such thing as a French law or German law or American law that is an independent object of study apart from the law of other countries', makes two other assertions along these lines.¹¹⁹ First, he writes that '[o]nly in a qualified sense can we even say that the German, the American, and the Frenchman are writing about the law of their own countries. They are addressing a problem that arises in each of their own countries but neither the problem nor its solution

¹¹⁴ Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', (1985) 26 Harvard Int. L.J. 411, p. 453. See also Vivian G. Curran, 'Cultural Immersion, Difference and Categories in US Comparative Law', (1998) 46 Am. J. Comp. L. 301; *id.*, 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union', (2001) 7 Columbia J. Eur. L. 63. But see, for example, Bernhard Großfeld, *Kernfragen der Rechtsvergleichung* (Tübingen: J. C. B. Mohr, 1996), p. 283.

¹¹⁵ Michel Foucault, *Les mots et les choses* (Paris: Gallimard, 1966), p. 68 ['la recherche première et fondamentale de la différence']. In this respect (as in many others), comparative legal studies does not differ from anthropology. See Carol J. Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law', (1989) 98 Yale L.J. 1631, p. 1631: 'anthropology is the study of the significance of cultural difference.'

¹¹⁶ Else Øyen, 'The Imperfection of Comparisons', in *id.* (ed.), *Comparative Methodology* (London: Sage, 1990), p. 1.

¹¹⁷ Goodrich, *Oedipus Lex*, *supra*, note 9, p. 241.

¹¹⁸ Charles Taylor, *The Malaise of Modernity* (Concord, Ontario: Anansi, 1991), pp. 35–6.

¹¹⁹ Gordley, *supra*, at text accompanying note 33.

are any more German than American or French.¹²⁰ Second, he observes that '[w]hen 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.'¹²¹ What assumptions underwrite these statements? I propose to consider this far-reaching version of the monistic argument by way of a 'problem' with which I am familiar on account of prior research, the question of whether – and, if so, to what extent – a seller must volunteer information to his prospective buyer before the agreement is concluded. On the assumption that the 'problem' manifests itself in both legal 'systems' to the extent at least that each legal 'system' regards the issue as suitably 'problematic', I wish to focus specifically on two jurisdictions, England and France.

In England, the common law continues to favour a rigorous application of the *caveat emptor* doctrine.¹²² Indeed, the House of Lords takes the view that a principle of 'good faith' is 'unworkable in practice' since it is 'inherently repugnant to the adversarial position of the parties'.¹²³ In France, however, a statute of 18 January 1992 enacts that 'the seller must, before the contract is entered into, put the consumer in a position to know all the essential features of the thing being sold'.¹²⁴ Beginning in 1945 with Michel de Juglart, a number of French writers have pleaded for the recognition of such a legal obligation.¹²⁵ Is it a coincidence that the call from Juglart and

¹²⁰ *Id.*, p. 561.

¹²¹ *Id.*, p. 563. For an amplification of this view, see James Gordley, 'Is Comparative Law a Distinct Discipline?', (1998) 46 Am. J. Comp. L. 607.

¹²² For example, see *Bell v. Lever Bros, Ltd*, [1932] A.C. 161 (H.L.), p. 224 (Lord Atkin); *Smith v. Hughes*, (1871) L.R. 6 Q.B. 597, p. 607 (Cockburn C.J.); *Banque Financière de la Cité SA v. Westgate Insurance Co.*, [1989] 2 All E.R. 952 (C.A.), pp. 988–1004 (Slade L.J.).

¹²³ *Walford v. Miles*, [1992] 2 A.C. 128, p. 138 (Lord Ackner). A striking illustration of the English resistance to the idea of 'good faith' is offered by the judgement in *Director General of Fair Trading v. First National Bank plc*, [2001] 3 W.L.R. 1297 (H.L.).

¹²⁴ *Loi No. 92–60 of 18 January 1992 Reinforcing the Protection of Consumers ('renforçant la protection des consommateurs')*, art. 2, D.1992.L.129 ['*Tout professionnel vendeur de biens (...) doit, avant la conclusion du contrat, mettre le consommateur en mesure de connaître les caractéristiques essentielles du bien*']. This text was followed by a further *Loi No. 96–588 of 1 July 1996 on Loyalty and Parity Within Commercial Relationships* ['*sur la loyauté et l'équilibre des relations commerciales*'], D.1996.L.295. For a commentary, including observations on the title of the statute, see Christophe Jamin, *Rev. trim. dr. civ.*, 1996, p. 1009.

¹²⁵ See Michel de Juglart, 'L'obligation de renseignements dans les contrats', *Rev. trim. dr. civ.*, 1945, p. 1. The best-known argument is in Jacques Ghestin, *Traité de droit civil: la formation du contrat*, 3d ed. (Paris: L.G.D.J., 1993), nos 593–673, pp. 576–653. See generally Muriel Fabre-Magnan, *De l'obligation d'information dans les contrats* (Paris: L.G.D.J., 1992).

those who heard him came when it did, that is to say, at a time when the Vichy regime had been advocating fierce anti-individualism and advancing its programme of regeneration of the national soul through the promotion of team spirit, service to the community and social solidarity?¹²⁶ Thus, Juglart's claim – which explicitly invites his readership to envisage the matter of pre-contractual information as 'one of the manifestations of this spirit of solidarity that characterizes our times'¹²⁷ – can be connected with the adoption of an ordinance dated 4 October 1945 laying the cornerstone of a new system of social security and of a statute dated 22 May 1946 operating the generalization of social security.¹²⁸

For Gordley's monistic argument to stand, it must be the case that, both in England and in France, the social and legal role and responsibilities of seller and buyer are constructed in the same way by the community; that the social and legal dynamics of the relationship between seller and buyer are constructed in the same way by the community; that the significance and value of information as a commodity and the perception of information as an object of legal duties and responsibilities are constructed in the same way by the community; that the values of self-reliance and social solidarity intervene in the same way in both jurisdictions; that the fear (and realistic likelihood) that a complaint will be made by the buyer to the seller after the sale is experienced in the same way by sellers in both jurisdictions; that the fear that the seller will suffer a social stigma or will find himself the object of legal proceedings as a result of a complaint being made by the buyer after the sale is experienced in the same way by sellers in both jurisdictions (so that

¹²⁶ *Quid* of the fact that Juglart's paper, published as it was in the immediate wake of the Second World War, may also have been indebted to the unprecedented levels of popularity and support which the French Communist Party and the then USSR enjoyed among the French population on account of the contribution of Communists at home and abroad in the defeat of Nazism. This wave of sympathy for orthodox communism nationally and internationally had a particular impact on French intellectuals who, in the aftermath of the war, were now forced to assess their behaviour and attitudes before and, importantly, during the conflict. Many were determined to be on the side of History, of progress, and to assist in the emancipation of the oppressed. For some, these values took the form of an active agenda for the socialization of law. See generally Jacques Donzelot, *L'invention du social* (Paris: Le Seuil, 1994); François Ewald, *L'Etat providence* (Paris: Grasset, 1986). For a current application of these ideas with specific reference to French contract law, see Christophe Jamin, 'Plaidoyer pour le solidarisme contractuel', in *Etudes offertes à Jacques Ghestin* (Paris: L.G.D.J., 2001), pp. 441–72.

¹²⁷ Juglart, *supra*, note 125, no. 1, p. 1 [*'une des manifestations de cet esprit de solidarité qui caractérise notre époque'*].

¹²⁸ *Ordonnance* No. 45–2250 of 4 October 1945 Concerning the Organization of Social Security [*'portant organisation de la sécurité sociale'*], D.1945.L.253; *Loi* No. 46–1146 of 22 May 1946 Concerning the Generalization of Social Security [*'portant généralisation de la sécurité sociale'*], D.1946.L.237.

the same deterrent effect is at work in this respect); that the stigma, if any, encountered by the buyer-as-complainer is experienced in the same way by buyers in both jurisdictions (so that the same deterrent effect is at work in this respect); that the eventual costs associated with a complaint from the point of view of the buyer are internalized in the same way by buyers in both jurisdictions (so that the same deterrent effect is at work in this respect); that the information regarding available legal rights or remedies in the possession of buyers is the same for buyers in both jurisdictions (so that the same incentive effect is at work in this respect); that access to justice is the same for buyers in both countries (so that the same incentive effect is at work in this respect); that the likelihood of a monetary award being made against the seller in the courts is the same in both jurisdictions and that that information is available to sellers and buyers in the same way in both jurisdictions (so that the same incentive effect is at work in this respect); and that the monetary award has the same impact on the seller's pocket in both jurisdictions (so as to have the same deterrent impact on sellers). These are only *some* of the seemingly countless considerations that a comparatist must take for granted in order to reach the conclusion that 'the problem' of pre-contractual information I have raised is the same in both jurisdictions. In advance of empirical study, I argue that the sameness that is postulated is simply unrealistic.

Now, the issue becomes even more complex if I envisage a situation where an English and a French court would each render a decision involving the matter of 'pre-contractual information'. Let us assume that the facts and the law are precisely the same in both jurisdictions. Clearly, one must still bear in mind that the English judge is English and that the French judge is French. Because of the factors I have just outlined, the way in which the English and French judges will approach the merits of a case involving the matter of pre-contractual information as between seller and buyer will vary. *Inevitably*, the judge comes to 'the problem' – and to the reading of the relevant texts – as a socialized human being, that is, as an individual educated in a specific cultural and legal environment, understood here as a structuring social space, who would have to say, whether in London or Paris, to quote from Philip Larkin: 'Here no elsewhere underwrites my existence.'¹²⁹ (Indeed, 'the specific legal practices of a culture are simply dialects of a

¹²⁹ Philip Larkin, 'The Importance of Elsewhere', in *Collected Poems* (London: Faber & Faber, 1990), p. 104 [1955]. For a very influential argument regarding the way in which 'socialization' impacts upon reading, see Stanley Fish, *Is There a Text in This Class?* (Cambridge, Mass.: Harvard University Press, 1980), pp. 331–2.

parent social speech' and one should not expect a legal culture – which, whatever else it also is, is a cultural practice or product like any other – to 'depart drastically from the common stock of understanding in the surrounding culture'.¹³⁰) But there is more. Different evidentiary rules and doctrines (themselves reflecting different social and political values developed over the long term) will make for a different construction of the facts in the eye of each law. In other words, even if the facts are the 'same' or, more accurately, even if lawyers in both jurisdictions construct the facts deemed relevant in precisely the 'same' way (something which I am prepared to assume for present purposes), it remains that the facts will not be the 'same' in the eye of each law. Likewise, different judicial drafting techniques will thematize certain dimensions of 'the problem' and ignore others. When French decisions, for instance, appeal to the comforting idea of interpretive stability that a grammatical discourse connotes so as to suggest that, although they are clearly not 'the law', they are simply a vehicle allowing for the stable production of the legislative texts' necessary legal solutions, they are doing much more than simply gesturing toward formalism. They are thereby advocating a particular vision of adjudication and of the values served by adjudication. The felt need to obfuscate, or at least to demote, the role of hermeneutic readings of the law in order not to invest the generative structure of the decision with the insecurity associated with purposive hermeneutics is, in itself, of considerable significance to an understanding of judicial governance and, more broadly, of a legal *mentalité*.¹³¹

The monistic argument, therefore, can hold only if its proponent is prepared to pretend that the problems which the law addresses and the solutions which the law provides to these problems are somehow unconnected to the cultural environment from which the problems and solutions arise. In other words, this kind of claim requires the comparatist to regard social problems and their legal treatment as occurring in a cultural vacuum, that is, to *bracket* historical, societal, political and psychological data. Only if one is willing to ignore the cultural dimension of the law can one say that the problem of 'pre-contractual information' and its treatment by the law can be considered irrespective of geography, of *place*. What remains unclear is

¹³⁰ Robert W. Gordon, 'Critical Legal Histories', (1984) 36 Stanford L.R. 57, p. 90. Of course, this is emphatically not to say that every manifestation of law within a culture is nothing but an example of that entire culture being acted out.

¹³¹ See Mitchel Lasser, '“Lit. Theory” Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse', (1998) 111 Harvard L.R. 689.

whether the comparatist propounding this monistic approach accepts that law necessarily partakes in the culture from which it emanates but prefers to close his eyes to this fact, leaving the matter to sociologists or other such figures regarded by mainstream lawyers as marginal at best, or whether he takes the view that, unlike art or literature, law is somehow completely disconnected from the society by which it is fabricated (so that law would be permanently dysfunctional). In either case, the proposed approach perpetuates the kind of dreary positivism which relegates comparative legal studies to a technical exercise whose output is deeply flawed and which, on this account, remains largely irrelevant to the matter of understanding alterity in the law.¹³² Consider, by way of illustration, Alan Watson's example regarding transfer of ownership and risk in sale and claiming to establish substantive sameness across laws.¹³³ Now, the fact is that the Roman 'rules' Watson refers to were written in Latin and purported to regulate the dealings of citizens in sixth-century Constantinople. The French rules mentioned by Watson were written in French and intended to govern citizens in pre-revolutionary France. And the Prussian rules addressed by Watson were written in German and were concerned with legal relationships in what remained feudal Prussia. I argue that cultural constructions of 'reality' and of law and of rules in the three settings inevitably harbour certain distinctive characteristics which, therefore, inevitably affect the interpretation of a rule, that is, which inevitably determine the ruleness of the rule according to the distinctive cultural logics of the native laws. These rules, thus, are not the same rules; any sameness stops at the bare form of words itself. Even then, this conclusion would not account for the fact that the inscribed words appear in three different languages with each language suggesting a specific relationship between the words and their content (for example, '[n]o language divides time or space exactly as does any other [...]; no language has identical taboos with any other [...]; no language dreams precisely like any other').¹³⁴ Watson, therefore, is only able to argue in favour of sameness by

¹³² But see Bernhard Großfeld, *The Strength and Weakness of Comparative Law*, transl. by Tony Weir (Oxford: Oxford University Press, 1990), pp. 79–80, where the author shows, to borrow one illustration from his vast reservoir, how 'the problem' of damage caused by the escape of water from one's land differs as it arises in Texas rather than England.

¹³³ Watson, *supra*, at text accompanying note 21.

¹³⁴ George Steiner, *What is Comparative Literature?* (Oxford: Oxford University Press, 1995), p. 10. There is a famous passage of Benjamin's where he reminds us that 'the word *Brot* [...] mean[s] something other to a German than what the word *pain* means to a Frenchman': Walter Benjamin, 'The Task of the Translator', in *Selected Writings*, ed. by Marcus Bullock and Michael

uncoupling the rules from the real experience of law-in-the-world, which he appears to regard as simply not being worthy of esteem. His exclusive concern is with the integration of the rules under examination into a new, shared and immediate conceptual world – an ideological endeavour which operates in a supposedly open, yet, in fact, most conservative manner. It can be seen how perspicacious Gabriel Tarde was when he faulted the tendency ‘to exaggerate the number and the extent of the similarities which strike the mind at first sight when comparing bodies of law’.¹³⁵

* * *

I argue that, although it may be inconvenient for lawyers so to acknowledge given the limits of their technical expertise and the fact that they have managed their lives to rules, law is a cultural fabric, such that the law comparatists address is inevitably indigenous and, therefore, different in the way something which is unique is necessarily different. Because ‘[t]here is only one thing in this world which cannot be compared, and that is “one thing”’,¹³⁶ comparison *requires* at least two elements. Now, the comparison of two elements must assume difference between them. The point is Leibniz’s: ‘By virtue of imperceptible variations, two individual things cannot be perfectly

W. Jennings and transl. by Harry Zohn, vol. I: 1913–1926 (Cambridge, Mass.: Harvard University Press, 1996), p. 257 [1923] (hereinafter ‘The Task of the Translator’). For the original text, see *id.*, ‘Die Aufgabe des Übersetzers’, in *Gesammelte Schriften*, ed. by Rolf Tiedemann, Hermann Schweppenhäuser and Tillman Rexroth, vol. IV, t. 1 (Frankfurt: Suhrkamp, 1972), p. 14 [‘In “Brot” und “pain” ist das Gemeinte zwar dasselbe, die Art, es zu meinen, dagegen nicht. In der Art des Meinens nämlich liegt es, daß beide Worte dem Deutschen und Franzosen je etwas Verschiedenes bedeuten, daß sie für beide nicht vertauschbar sind, ja sich letzten Endes auszuschließen streben; am Gemeinten aber, daß sie, absolut genommen, das Selbe und Identische bedeuten’] (hereinafter ‘Die Aufgabe des Übersetzers’). There are many such examples in circulation, some of which are collected in Willis Barnstone, *The Poetics of Translation* (New Haven: Yale University Press, 1993).

¹³⁵ Gabriel Tarde, *Les transformations du droit* (Paris: Berg, 1994), p. 34 [‘exagérer le nombre et la portée des similitudes qui frappent l’esprit, à première vue, quand on compare des corps de droit’] (1893). For a further illustration showing how the urge to derive similarities across different legal traditions can lead to extraordinary claims, see Tony Weir, ‘Die Sprachen des europäischen Rechts’, *Zeitschrift für Europäisches Privatrecht*, 1995, pp. 372–3, who rebuts the argument that the English Statute of Frauds is indebted to the 1566 *Ordonnance de Moulins*. For this assertion, see Ernst Rabel, ‘The Statute of Frauds and Comparative Legal History’, (1947) 63 L.Q.R. 174.

¹³⁶ Ferdinand J. M. Feldbrugge, ‘Sociological Research Methods and Comparative Law’, in Mario Rotondi (ed.), *Inchieste di diritto comparato*, vol. II: *Buts et méthodes du droit comparé* (Padova: Cedam, 1973), p. 213. Cf. Mauro Cappelletti, Monica Seccombe and Joseph H. H. Weiler, ‘Integration Through Law: Europe and the American Federal Experience – A General Introduction’, in *id.* (eds.), *Integration Through Law*, vol. I: *Methods, Tools and Institutions*, t. 1: *A Political, Legal and Economic Overview* (Berlin: Walter de Gruyter, 1986), p. 9: ‘Comparative analysis becomes meaningless in conditions of identity.’

similar.¹³⁷ *To accord difference priority is the only way for comparative legal studies to take cognizance of what is the case.* In acknowledgement 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 constitutes, in part at least, the other's legal identity (which can always be made to look good or bad) and reconstitutes, in part at least, my own identity? – comparatists must resist the powerful temptation toward the construction of abstract and superficial commonalities and assent to the ineliminability of difference, which it becomes their responsibility to characterize, articulate and justify.¹³⁸ Thus, they must embrace thick or deep thought: 'The force that shatters the appearance of identity is the force of thinking.'¹³⁹ Indeed, the common denominators that mark the outcome of legal research are common only in the light of a particular research project and its limits as deliberately set. Any finalized unity is, in this sense, strictly mental. In effect, each data holds an infinite complexity, the exploration of which never ceases to relegate the frontiers of homogeneity to the benefit of heterogeneity. To mention Tarde again, 'wherever a scholar digs underneath apparent indistinction, he discovers a wealth of unexpected distinctions': before the telescope, the stars were considered to be homogeneous and before the microscope, the molecules were considered to be homogeneous.¹⁴⁰ Likewise, any sameness identified by comparatists signifies but a transitional state of knowledge, the relevant and fundamental differences being more or less deliberately confined to obscurity.

¹³⁷ Leibniz, *Nouveaux essais sur l'entendement*, in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, ed. by C. J. Gerhardt, vol. V (Hildesheim: Georg Olms, 1960), p. 49 [*'En vertu des variations insensibles, deux choses individuelles ne sauraient être parfaitement semblables'*] (1882). See also Martin Heidegger, *Identity and Difference*, transl. by Joan Stambaugh (Chicago: University of Chicago Press, 2002), pp. 23–4: 'For something to be the same, one is always enough' [hereinafter *Identity*]. For the original text, see *id.*, *Identität und Differenz* (Stuttgart: Günther Neske, 1957), p. 10 [*'Damit etwas das Selbe sein kann, genügt jeweils eines'*] (hereinafter *Identität*). Cf. Adorno, *supra*, note 4, p. 184: 'Without otherness, cognition would deteriorate into tautology; what is known would be knowledge itself.' For the original text, see *id.*, *supra*, note 40, p. 185 [*'Ohne sie verkäme Erkenntnis zur Tautologie; das Erkannte wäre sie selbst'*].

¹³⁸ The point about anything being liable to laudable or damning redescription is underlined in Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), p. 73.

¹³⁹ Adorno, *supra*, note 4, p. 149. For the original text, see *id.*, *supra*, note 40, p. 152 [*'Die Kraft, die den Schein von Identität sprengt, ist die des Denkens selber'*].

¹⁴⁰ Gabriel Tarde, *Monadologie et sociologie*, in *Oeuvres*, ed. by Eric Alliez, vol. I (Paris: Institut Synthélabo, 1999), p. 72 [*'Partout où, sous l'indistinct apparent, un savant creuse, il découvre des trésors de distinctions inattendues'*] (1893). The two examples are Tarde's.

The prioritization of difference satisfies the need for self-transcendence. If comparison aims primarily to show what legal communities all share, then no one needs to revise one's opinions in order to take into account perspectives and experiences beyond oneself. It is only through the assumption that communicative interaction means encountering difference of meaning that I, as observer, am aware of the fact that my position is perspectival – and that I can then act upon this fact. Indeed, it should now be clear that one can pursue a programme of harmonization of law that will secure the allegiance of the various constituencies only by retreating from the imperialist drive to oneness and by doing justice to the profound diversity of legal experience across jurisdictions.¹⁴¹ Is the key to the sustainability of the ecosystem not biodiversity?¹⁴² In my opinion, the favour which habitual comparative endeavours – including 'common-core' research – continues to enjoy is a good measure of the distance comparative legal studies must still travel before it emancipates itself from monological discourse and, at long last, acquires the intellectual credibility which it has thus far properly been denied on account of its recurrent failure to propound thick or deep understanding.¹⁴³

¹⁴¹ See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) p. 197. Cf. René Girard, *La violence et le sacré* (Paris: Grasset, 1972), p. 89: 'where difference is lacking, violence threatens' [*'Là où la différence fait défaut, c'est la violence qui menace'*].

¹⁴² For a useful introduction to the argument from biodiversity, see David Takacs, *The Idea of Biodiversity* (Baltimore: Johns Hopkins University Press, 1996). For stimulating connections between biological and cultural diversity, see Luisa Maffi (ed.), *On Biocultural Diversity* (Washington, DC: Smithsonian Institution, 2001).

¹⁴³ For noteworthy – and, of course, non-exhaustive – illustrations of what can be done to make comparative legal studies intellectually respectable, see Bernard Rudden, 'Torticles', (1991–2) 6/7 *Tulane Civ. L. Forum* 105; Geoffrey Samuel, *The Foundations of Legal Reasoning* (Antwerp: Maklu, 1994); Ewald, *supra*, note 68; Janet E. Ainsworth, 'Categories and Culture: On the "Rectification of Names" in Comparative Law', (1996) 82 *Cornell L.R.* 19; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61 *Modern L.R.* 11; Lasser, *supra*, note 131; Nicholas Kasirer, '*Lex-icographie mercatoria*', (1999) 47 *Am. J. Comp. L.* 653 [hereinafter '*Lex-icographie*']; John C. Reitz, 'Political Economy and Abstract Review in Germany, France and the United States', in Sally J. Kenney, William M. Reisinger and *id.* (eds.), *Constitutional Dialogues in Comparative Perspective* (London: Macmillan, 1999), pp. 62–88; James Q. Whitman, 'Enforcing Civility and Respect: Three Societies', (2000) 109 *Yale L.J.* 1279; Teemu Ruskola, 'Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective', (2000) 52 *Stanford L.R.* 1599; Nicholas Kasirer, '*Agapè*', *Rev. int. dr. comp.*, 2001, p. 575 [hereinafter '*Agapè*']; Geoffrey Samuel, *Epistemology and Method in Law* (Dartmouth: Ashgate, 2003) [hereinafter *Epistemology*]. This strictly exemplificational list is deliberately limited to twelve publications covering the period from the early 1990s to the early 2000s. It is arranged in roughly chronological order.

Lucia Zedner's remark is apposite: 'If the comparative project is to produce anything of value we need to develop an acute sensitivity to the peculiarities of the local.'¹⁴⁴

* * *

Except, of course, to the extent that the self cannot be the other, these observations should not be read to indicate that I regard alterity as being *absolutely absolute* (if only because absolute otherness would imply absolute identity). To suggest the complete impenetrability of alterity would make the very idea of comparison unintelligible and incoherent. The basic point can be formulated thus: 'the other is absolutely the other by being an ego, that is to say, in a certain way, the same as me.'¹⁴⁵ Nor does incommensurability across legal traditions detract from comparability. For example, although, unlike the Fahrenheit and centigrade scales, the German and Spanish languages are incommensurable – because they cannot be assessed by reference to a shared standard of evaluation on account of the non-homology between linguistic grids which, in turn, reflects the differences between the two cultures and their environments as those two cultures have experienced them – they can be compared, say, with respect to the position of the verb within the typical sentence.¹⁴⁶ In other words, and with the exception of situations when understanding someone or something can only mean understanding that person's or that thing's incomprehensibility,¹⁴⁷ even the presence of

¹⁴⁴ Lucia Zedner, 'In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany', (1995) 4 Soc. & Leg. Stud. 517, p. 519.

¹⁴⁵ Derrida, *supra*, note 10, p. 187 [*'l'autre n'est absolument autre qu'en étant un ego, c'est-à-dire d'une certaine façon le même que moi'*]. In this sense, there is a relation between self and other, *pace* Levinas, *supra*, note 74 and *infra*, note 219, *passim*. See also Paul Ricoeur, *Soi-même comme un autre* (Paris: Le Seuil, 1990), p. 387, who notes that '“he thinks”, “she thinks” means: “he/she says in his/her heart: I think”' [*'il pense”, “elle pense” signifie: “il/elle dit dans son coeur: je pense”*']. Cf. Samuel, *Epistemology*, *supra*, note 143, p. 15, who observes that whether in the civil-law or the common-law world law is about relations between individuals, on the one hand, and between individuals and things, on the other.

¹⁴⁶ The same goes for other examples of incommensurability, such as those offered in Nelson Goodman, *Ways of Worldmaking* (Indianapolis: Hackett, 1978), p. 13. Incidentally, to the contrast that Goodman draws between twelve-tone and eight-tone musical scales one could add the one between jazz and classical music.

¹⁴⁷ Cf. Theodor W. Adorno, 'Trying to Understand *Endgame*', in *Notes to Literature*, ed. by Rolf Tiedemann and transl. by Shierry Weber Nicholsen, vol. I (New York: Columbia University Press, 1991), p. 243: 'Understanding [the play] can mean only understanding its unintelligibility, concretely reconstructing the meaning of the fact that it has no meaning' [1961]. For the German text, see *id.*, 'Versuch, das Endspiel zu verstehen', in *Gesammelte Schriften*, vol. XI: *Noten zur Literatur*, ed. by Rolf Tiedemann (Frankfurt: Suhrkamp, 1974), p. 283 [*'Es verstehen kann nichts anderes heißen, als seine Unverständlichkeit verstehen, konkret den Sinnzusammenhang dessen*

radically divergent evaluative standards does not prevent the possibility of understanding another's meaning – at least in the 'weak' sense of achieving an appearance of consensus for, in fact, the possibility of accordance is limited given that 'one understands *differently, when one understands at all*'.¹⁴⁸ Nor does the possibility of understanding another's meaning prevent a finding of incommensurability, *pace* Donald Davidson. Applying Davidson's reasoning to comparative legal studies, if a comparatist were able to render anything within another legal culture sufficiently meaningful so as to make it intelligible, he would have to conclude that the other law is commensurable with his own. In sum, Davidson tells us that cognitive bridges, no matter how fragile, foreclose a finding of incommensurability. But does it follow from the existence of cognitive bridges (imagined or otherwise) that two legal cultures cannot rest on irreconcilable ontological premises? In fact, although Davidson argues that even the merest cognitive connection prevents incommensurability, it seems that cognitive connections represent a necessary *semantic* pre-requisite to the appreciation of *epistemological* incommensurability, a kind of constitutive dialogical threshold. Envisage two laws, one where judicial review is based on reasonableness and the other where it rests on proportionality. There exists between these two laws a semantic commonality or dialogical interface around which members of both legal communities can agree: for both laws, the issue concerns the legitimacy of judicial review. And this semantic commonality or dialogical interface remains, even though each law has its own understanding of what 'judicial review' (and legitimacy) can mean. Now, it is precisely this commonality

nachkonstruieren, daß es keinen hat']. Adorno's observation concerned Samuel Beckett's *Fin de partie*.

¹⁴⁸ Gadamer, *supra*, note 48, p. 297. For the German text, see *id.*, *Wahrheit und Methode*, 6th ed. (Tübingen: J. C. B. Mohr, 1990), p. 302 ['*daß man anders versteht, wenn man überhaupt versteht*'] (emphasis original). This *caveat* is also captured by Humboldt: 'Nobody means by a word precisely and exactly what his neighbour does, and the difference, be it ever so small, vibrates, like a ripple in water, throughout the entire language. Thus all understanding is always at the same time a not-understanding, all concurrence in thought and feeling at the same time a divergence': Wilhelm von Humboldt, *On Language: On the Diversity of Human Language Construction and Its Influence on the Mental Development of the Human Species*, ed. by Michael Losonsky and transl. by Peter Heath (Cambridge: Cambridge University Press, 1988), p. 63 [1836]. For the original text, see *id.*, *Über die Verschiedenheit des menschlichen Sprachbaues*, ed. by Donatella Di Cesare (Paderborn: Ferdinand Schöningh, 1998), pp. 190–1 ['*Keiner denkt bei dem Wort gerade und genau das, was der andre, und die noch so kleine Verschiedenheit zittert, wie ein Kreis im Wasser, durch die ganze Sprache fort. Alles Verstehen ist daher immer zugleich ein Nicht-Verstehen, alle Übereinstimmung in Gedanken und Gefühlen zugleich ein Auseinandergehen*'].

or interface around the notion of ‘judicial review’ which allows the comparatist to apprehend the incommensurability of the two approaches, to realize how these two epistemological orientations, these two conceptions, can only signify alterity *vis-à-vis* each other despite a common semantic referent. What rod could the comparatist use to measure one perspective based on the judge-as-participant-in-the-community (the ‘reasonableness’ approach) and the other founded on the judge-as-agent-of-government (the ‘proportionality’ model)? Incommensurability is not untranslatability; it can never, therefore, be reduced to a question that would be exclusively or chiefly semantic.¹⁴⁹ Ultimately, incommensurability is best apprehended as an important hermeneutic device allowing the comparatist to protect the identity of any particular cognitive framework and to preserve the variety of epistemic perspectives. Incommensurability can thus be considered as an inherent feature of diversity.

Still as regards the matter of alterity not being *absolutely absolute*, I accept that no comparison can be initiated without a comparatist taking the view that there is an apparent sameness between the objects of comparison, that they seem alike in at least one respect. Inevitably, operating his culturally pre-oriented understanding-enabling background, the comparatist must build a perceptual or cognitive bridge allowing for the apprehension of something as something that can be compared with something else – a claim which finds its resonance in the Heideggerian ‘as-structure’ of perception.¹⁵⁰ Let us refer to this estimation as the ‘condition of possibility’ of comparison, the ineliminable sensibility that demarcates the epistemological space within which it becomes possible to study other laws. But this point must

¹⁴⁹ For Donald Davidson’s position, see his *Inquiries into Truth and Interpretation* (Oxford: Oxford University Press, 1984), pp. 183–98. To the extent that Davidson’s argument turns on the fact that the idea of difference between conceptual schemes is unintelligible, one may doubt whether the feeling of *Unheimlichkeit* one experiences upon finding oneself confronted with alterity is aptly articulated in terms of an opposition between ‘conceptual schemes’. It seems that rhetorical practice, religious sensibility and cultural suggestibility, to take but three random illustrations, can hardly be reduced to ‘conceptual schemes’. My general reply to Davidson owes much to Hans-Herbert Kögler, *The Power of Dialogue*, transl. by Paul Hendrickson (Cambridge, Mass.: MIT Press, 1996), pp. 163–6. As regards the illustration based on judicial review, I have derived assistance from Roger Cotterrell, ‘Judicial Review and Legal Theory’, in Genevra Richardson and Hazel Genn (eds.), *Administrative Law and Government Action* (Oxford: Oxford University Press, 1994), pp. 13–34.

¹⁵⁰ See Gerald L. Bruns, *Tragic Thoughts at the End of Philosophy* (Evanston: Northwestern University Press, 1999), p. 28. For a related formulation of this point, see Andrew Benjamin, *Philosophy’s Literature* (Manchester: Clinamen Press, 2001), p. 2: ‘it is the presence of the object as a repetition that allows for interpretation.’

not be understood to mean that comparatists can then legitimately effectuate an approximation of alterity to sameness, that they can then engage in a silencing or obliteration of alterity, that they can then repress alterity by dismissing it as insignificant or reduce alterity by narcissistically assimilating it to sameness. I argue that comparative legal studies must assume the duty to acknowledge, appreciate and respect alterity. Without such recognition, no ethics is possible. In other words, the *raison d'être* of the comparative project lies in the refusal of national pride, in the rejection of cultural taboos, in the awareness and valorization of difference and in the empathic articulation of the voices of alterity to the point where the self is actually prepared to accept being *othered* by otherness.¹⁵¹ This agenda, I may add, does not assume the existence of holistic and fixed systems of meaning. It leaves room for human agency and creative practice; it also allows for the contested dimensions of social life. In particular, it is sensitive to the cohabitation within given communities of differentiated meanings ascribed by those in different social positions. Let me reiterate, for example, that the identity of the civil-law or common-law traditions does not exist in the sense of *semper idem* or *semper unum*. In fact, as the Spanish language teaches us, identity need not be understood as a fixed condition or state [*'ser'*] but can be apprehended as fluid, that is, as suggesting movement [*'estar'*].

* * *

If only because a comparatist cannot separate his inherence in his law from his inherence in his act of comparison, there is, of course, a sense in which I construct and maintain difference even as I purport merely to explain it (can the 'real' ever be encountered by a disembodied observer and can the 'real' ever be encountered except through idealization and fantasy – which is *not* to say that the fact that knowledge is subjectively articulated or designed denies it status as knowledge).¹⁵² A law, like a thing, is what it is and it is not

¹⁵¹ I borrow the neologism from Rodolphe Gasché, *Of Minimal Things* (Stanford: Stanford University Press, 1999), p. 324. For a well-known argument to the effect that an encounter with another culture ought to prompt one to reflect critically on one's own cultural situation, see Peter Winch, 'Understanding a Primitive Society', (1964) 1 *Am. Philosophical Q.* 307. Of course, there is a crucial sense in which the self always-already features an irreducible otherness, an other scene, *ein anderer Schauplatz* – to borrow Freud's designation of the unconscious. Comparison, like psychoanalysis, is a transference process in which one redefines oneself in the course of renegotiating one's relation with the other and, specifically, with the other-in-the-law.

¹⁵² Gadamer is right to say that '[w]e always find ourselves within a situation, and [that] throwing light on it is a task that is never entirely finished': *supra*, note 48, p. 301. For the German text, see *id.*, *supra*, note 148, p. 307 [*'Man steht in ihr, findet sich immer schon in einer Situation*

one of its ontological characteristics not to be another law: difference has no self of its own. The fact that differences are fundamentally accidental and inessential means that a law is never different as such, but that it is differentiated by the comparatist's hermeneutic thought as he decides when the movement of difference starts and stops – which, therefore, means that the comparatist intervenes performatively in that he does more than simply report on existing data (difference is not in the nature of visual data) but also generates original information (which is why the comparatist's object of study is never an *object*). Difference, then, has no inert existence that could be severed from the various descriptions and qualifications that mediate understanding and compromise the ideal character of the act of referentiality. This is to say that the comparatist inheres in the difference that he experiences. This is also to say that, because it rests on an infinite bringing forth of itself, difference is inexhaustible in that it never ceases to become manifest in new facets as the relationship of power between the comparatist and his 'object' of study fashions the kind of knowledge created by the comparatist about his 'object' of study: that which is compared is not a given but an *assignment* and difference is not a given but an *accomplishment*. Yet, it would be too much to say that the civil-law and common-law traditions, for instance, have no independent existence beyond the individual realizations that accrue from historical awareness.¹⁵³ The historical fact of two main legal traditions in the western world (one that received Roman law and the other that did not) delineates an economy of signification that cannot be reduced to a phantasmatic projection (contrary to what the universalist bias of mainstream comparative legal studies would have us believe). Thus,

vor, deren Erhellung die nie ganz zu vollendende Aufgabe ist']. At the minimum, I can say that I was born and lived for twenty years or so within a francophone minority, which continues to owe its existence to the fact that it has relentlessly, at least since the early 1960s, asserted its cultural difference from neighbouring anglophone communities. This autobiographical note, of course, alludes to the fact that what I may wish to refer to as my 'subjectivity' incorporates institutionalized sets of assumptions that have constituted me into the comparatist I have become and which, to a significant extent, predetermine any intellectual move I may make despite the lack of any explicit fidelity on my part to my native culture.

¹⁵³ For a related argument in the context of literary criticism, see Edward W. Said, 'Orientalism Reconsidered', (1985) 1 *Cultural Critique* 89, p. 92: 'Each age, for instance, re-interprets Shakespeare, not because Shakespeare changes, but because despite the existence of numerous and reliable editions of Shakespeare, there is no such fixed and non-trivial object as Shakespeare independent of his editors, the actors who played his roles, the translators who put him in other languages, the hundreds of millions of readers who have read him or watched performances of his plays since the late sixteenth century. On the other hand, *it is too much to say that Shakespeare has no independent existence at all*' [my emphasis].

difference cannot be reduced to my psychological state or to the vagaries of my thought.¹⁵⁴ In the words of Bernard Williams, '[k]nowledge is of what is there *anyway*'.¹⁵⁵

To defend the priority of difference is not to suggest, moreover, that what philosophers might call the 'problem' of difference can ever be resolved. In the way in which I am never done with my responsibilities for the other, in the way in which my exacting answerability to the other is incessant, difference is ultimately intractable. Consider how the 'object' of study which is different is irreducibly independent from the comparatist who thinks or expresses this difference and from its empirical manifestation in the comparatist's speech. The gap, which lies between an always-already-constituted law and a constituting consciousness, continually defers 'object' and thought from coming into coincidence.¹⁵⁶ (The *décalage* is amplified by the fact that any comparison is mediated by the felt need to tell an effective story, one that is at once coherent and persuasive. What is written, therefore, involves both the exclusion of what would undermine the credibility of the narrative and the inclusion of discursive forms that stamp the story with scholarly authority.¹⁵⁷) This experience of difference – or, perhaps, this

¹⁵⁴ To quote Levinas, '[i]t is not difference which makes alterity: alterity makes difference': Emmanuel Levinas, *Is It Righteous To Be?*, ed. by Jill Robbins (Stanford: Stanford University Press, 2001), p. 106 [1988].

¹⁵⁵ Bernard Williams, *Descartes: The Project of Pure Enquiry* (London: Harvester, 1968), p. 64 [emphasis original].

¹⁵⁶ This is the gist of Derrida's famous pun on '*différence*' and '*différance*': *supra*, note 10, *passim*. See also *id.*, *supra*, note 46, pp. 1–29. Cf. Werner Hamacher, *Premises*, transl. by Peter Fenves (Stanford: Stanford University Press, 1996), pp. 15–16: 'Only in the not-yet and never-once of understanding can something be understood.'

¹⁵⁷ What is recounted partakes in a reflection on an experience which once was and, because it has perished, cannot be again. Writing, since it necessarily intervenes at a time that is subsequent to experience, remains as a memory of that which cannot be restored *as such*. Thus, Flaubert in his Egyptian diary: 'Between the I of tonight and the I of that other night, there is the difference between the corpse and the surgeon performing the autopsy': Gustave Flaubert, *Voyage en Egypte*, ed. by Pierre-Marc de Biasi (Paris: Grasset, 1991), p. 125 ['*Entre le moi de ce soir et le moi de ce soir-là, il y a la différence du cadavre au chirurgien qui l'autopsie*'] (1851). The magnitude of the illusion is liable to increase with time. In March 1836, Stendhal told of his crossing of the Grand-Saint-Bernard pass with the Italian army thirty-six years earlier: 'I very well remember the descent. But I do not want to hide to myself that five or six years later I saw an engraving of it, which I thought was a very good likeness, and my recollection is *only* of the engraving': Stendhal, *Vie de Henry Brulard*, in *Oeuvres intimes*, ed. by Victor Del Litto, vol. II (Paris: Gallimard, 1982), p. 941 ['*je me figure fort bien la descente. Mais je ne veux pas dissimuler que cinq ou six ans après j'en vis une gravure que je trouvai fort ressemblante, et mon souvenir n'est plus que la gravure*'] (1890) [emphasis original].

épreuve of difference – reminds us that the position of being responsible (the mastery of the ‘I’) is more a dignity than a happiness.¹⁵⁸

* * *

Some of the most obvious implications resulting from the prioritization of difference may now be addressed. At the outset, the focus on difference identifies a practice, a manner, a style of thinking which purports to engage behaviour, to inculcate the propensity to act in a certain fashion and to obtain a modification of consciousness in the way the comparatist sees the world, himself and his relationships with others. It is the expression of a being-in-the-world. It must, therefore, affect what comparatists look for and thus what they get to know – their knowledge-claims – and how they (and others) act on the basis of what becomes known. What is at stake is the shape and contents of the comparative psyche and, ultimately, the idea and ideal of knowledge – let us remember that what we call the ‘other’ is, in fact, what we *know* of the ‘other’. Bearing in mind that every law is able to be considered with respect to its particularity, the aim must be for comparatists to abjure the search for imputed sameness – always superficial, inevitably reductionist – and deliberately to devote their enterprise to the elucidation of specificity, that is, to delve as deeply as possible into the creative matrices of particular legal cultures – to embrace, to quote again from Ezra Pound, ‘the method of Luminous Detail’¹⁵⁹ – with a view to yielding knowledge that is neither purposefully logocentric nor willingly exclusionary, that neither engages in intentional foreclosure or abjection: ‘one must, through

¹⁵⁸ In one of his essays on Hölderlin, Heidegger refers to ‘the experience of the foreign’ (*die Erfahrung des Fremden*): Martin Heidegger, *Erläuterungen zu Hölderlins Dichtung*, 2d ed. (Frankfurt: Vittorio Klostermann, 1951), p. 109. The notion of ‘*Erfahrung*’ as understood by Heidegger is of particular interest for comparatists. For example, see *id.*, *On the Way to Language*, transl. by Peter D. Hertz (New York: Harper & Row, 1971), p. 57: ‘To undergo an experience with something – be it a thing, a person, or a god – means that this something befalls us, strikes us, comes over us, overwhelms and transforms us.’ For the German text, see *id.*, *Unterwegs zur Sprache* (Pfullingen: Günther Neske, 1959), p. 159 [‘*Mit etwas, sei es ein Ding, ein Mensch, ein Gott, eine Erfahrung machen heißt, daß es uns widerfährt, daß es uns trifft, über uns kommt, uns umwirft und verwandelt*’]. Interestingly, the French translation for the Heideggerian ‘*Erfahrung*’ is ‘*épreuve*’. For example, see Antoine Berman, *L’épreuve de l’étranger* (Paris: Gallimard, 1984), p. 147. The English translator has saluted this rendition as being ‘much richer’ than ‘*expérience*’: *id.*, *The Experience of the Foreign*, transl. by S. Heyvaert (Albany: State University of New York Press, 1992), p. vii. The English language is seemingly confined to the bland ‘experience’, the extravagant ‘ordeal’ or the equivocal ‘challenge’.

¹⁵⁹ Ezra Pound, ‘I gather the Limbs of Osiris’, in *Selected Prose 1909–1965*, ed. by William Cookson (New York: New Directions, 1973), p. 21 [1911]. Pound adds that these facts, the ‘luminous details’, ‘gover[n] knowledge as the switchboard the electric circuit’: *id.*, p. 24.

the analogies, grasp the differential quality.¹⁶⁰ There is, in fact, a pair of related formulations in French – a ‘*parti pris*’ and ‘*prendre son parti*’ – which connote at least three meanings that jointly capture the three main facets of my argument. First, one can have a ‘*parti pris*’ in the sense of showing purposefulness. For example, a French sentence could run thus: ‘*Chez lui, le parti pris de faire du bien se remarquait vite*’ (‘In him, the determination to do good could easily be noticed’). A variation on this sentence would read: ‘*Il avait pris le parti de faire du bien*’ (‘He had determined to do good’). Second, a ‘*parti pris*’ refers to a prejudice, whether positive or negative, as in the sentence, ‘*il y a trop de parti pris dans ses jugements*’ (‘there is too much prejudice in his opinions’). Third, ‘*prendre son parti*’ can mean ‘to resign oneself’. After one has lost an important vote, it can be said that ‘*il en a pris son parti*’, that ‘he has resigned himself to it’. Purposefulness, prejudice and resignation are three cardinal features of the brand of comparative legal studies I advocate. I claim that comparatists must resign themselves to the fact that law is a cultural phenomenon and that, therefore, differences across legal cultures can only ever be overcome imperfectly. Disclaiming any objectivity (and, therefore, bringing to bear their own prejudices as situated observers), they must purposefully privilege the identification of differences across the laws they compare lest they fail to address singularity with scrupulous authenticity. They must make themselves into *difference engineers*.¹⁶¹

There is more. Within the European context, the French or German jurist should ensure that English law forms part of the terms of comparison in that if one compares strictly within one’s own legal tradition, one may form the (unwarranted) view that certain epistemological assumptions are necessary or natural while they are simply characteristic of laws in a particular historico-socio-cultural configuration. If the benefits derived from the act of comparison are to be optimized, the observer needs to be confronted with the breadth of possibilities, something which is best achieved at the level of ‘most-different-units design’, that is, as it involves a comparison across the civil-law and common-law traditions.¹⁶² Indeed, contrary

¹⁶⁰ Francis Ponge, ‘My Creative Method’, in *Oeuvres complètes*, ed. by Bernard Beugnot, vol. I (Paris: Gallimard, 1999), p. 536 [‘*Il faut, à travers les analogies, saisir la qualité différentielle*’] (1961). The title appears in English.

¹⁶¹ I borrow the label from the sub-title in Keith A. Pearson (ed.), *Deleuze and Philosophy* (London: Routledge, 1997).

¹⁶² Cf. Richard H. S. Tur, ‘The Dialectic of General Jurisprudence and Comparative Law’, [1977] *Juridical R.* 238, p. 246.

to the view held by those who wish to trivialize comparative studies featuring civil-law and common-law jurisdictions,¹⁶³ the fact remains that very much of significance has yet to be written on the civil law and common law as idiosyncratic narratives or discursive strategies.¹⁶⁴ (I also have in mind various features of the discourse of the undisclosed or the unthought, such as the conditions of subjective attachment to the institution; the *mise en scène* of symbols and images, connecting to the questions of constraint and emancipation; the silences;¹⁶⁵ the interdictions and their problematizations.) There is a clear sense in which the ethical encounter, which I argue must govern the act of comparison, has simply not (yet) materialized in the context of civil-law/common-law interactions – a claim which need not deny the indisputable need for comparatists also to move their field-work beyond Europe and North America.

Regard for the prescriptive guidance afforded by comparison-as-difference further helps the comparatist to determine, for example, whether a treatment of German law in the casebook format properly allows the English lawyer to whom it is destined the opportunity of a thick or deep understanding of German law *as German law*.¹⁶⁶ It permits the comparatist

¹⁶³ For example, see Mattei, *supra*, note 78, p. 23, who regards ‘the traditional distinction between common law and civil law [as] a subdivision within a highly homogeneous family of legal systems: the western legal tradition’.

¹⁶⁴ Among the various differences which such epistemological investigations might elucidate in order to understand how they are made, the following motifs, which I introduce somewhat schematically (and, therefore, disputably), appear worthy of especial attention. Civil law is language that is (or wants to be) fixed, settled while the words of the common law circulate in the air as so many stories, sayings and memories. Also, while civil law is assertive of what is the case, common law is responsive to whatever it hears. Civil law is apodictic or propositional form, a system of concepts, while common law is self-reflexive, material, figurative and nomadic language. Civil law is rule-governed and self-contained while common law is spontaneous, open-ended, unrestrained by the law of non-contradiction. Civil law aspires only to what is necessary and universal while common law is singular, contingent and refractory to categories. Civil law is disengaged and monadic, always careful to determine what counts as itself, while common law is porous, exposed, always captivated by whatever is otherwise. Note that these labels are meant mutually to clarify rather than to exclude one another. I closely follow Bruns, *supra*, note 150, p. 2.

¹⁶⁵ The cultural value of silence is evoked by Michel Foucault, *Dits et écrits*, ed. by Daniel Defert and François Ewald, vol. IV: 1980–1988 (Paris: Gallimard, 1994), pp. 525–6 [1983]. See also José Ortega y Gasset, *Man and People*, transl. by Willard R. Trask (New York: Norton, 1957), p. 244. For the original text, see *id.*, *El hombre y la gente*, in *Obras completas* (Madrid: Alianza Editorial, 1994), p. 250 [1957].

¹⁶⁶ For a re-presentation of German law as a collection of cases, see Basil S. Markesinis, *The German Law of Torts: A Comparative Treatise*, 4th ed. by *id.* and Hannes Unberath (Oxford: Hart, 2002). Contrast H. C. Gutteridge, *Comparative Law*, 2d ed. (Cambridge: Cambridge University Press, 1949), p. 91: ‘an English comparative lawyer must resist the temptation to approach the study of

to appreciate that the claim that ‘one must [...] “anglicize” German law in order to make it more palatable to an English readership’ means, in effect, that the English audience is (somewhat patronizingly) denied the experience of the *Germanness* of German law.¹⁶⁷ Indeed, the English readership is made to learn something which is emphatically *not* German law such as ‘German tort law’.¹⁶⁸ This approach trivializes the specificity of another legal community’s experience by confining it to the observer’s own cognitive categories. It involves a manifest expulsion of the values of humility and deference from the relational framework between observer and observed showing the observer to be more interested in the vindication of his own *author-ity* than in the pursuit of ethical communicative action.¹⁶⁹ It is as if the proponents of this analytical framework had been reading US mathematician Warren Weaver: ‘When I look at an article in Russian, I say: “This is really written in English, but it has been coded in some strange symbols. I will now proceed to decode”.’¹⁷⁰ (Note that the way in which comparatists-at-law must allow the other to realize his vision of his world is not unlike the manner in which the translator must inscribe alterity at the heart of identity by accepting that the original presence of the guest language ought not to be effaced. If a translation aimed to look so ‘natural’ within the host

a problem in continental law by way of judicial decisions.’ For a critique of the use of casebooks as pedagogical instruments for the study of the civil-law tradition, see Ewald, *supra*, note 68, pp. 1968–75. The basic antimony is captured by Samuel who notes that in the common law ‘legal reasoning is a matter, not of applying pre-established legal rules as such [as in the civil law], but of pushing outwards from the facts’: *Epistemology*, *supra*, note 143, p. 104.

¹⁶⁷ Gerhard Dannemann and Basil Markesinis, ‘The Legacy of History on German Contract Law’, in Ross Cranston (ed.), *Making Commercial Law: Essays in Honour of Roy Goode* (Oxford: Oxford University Press, 1997), p. 29. For a critique of Dannemann and Markesinis, see Roderick Munday, ‘Book Review’, [1998] Cambridge L.J. 222, pp. 222–3.

¹⁶⁸ Markesinis, *supra*, note 166.

¹⁶⁹ For a reply which strains credulity, see Basil Markesinis, ‘Studying Judicial Decisions in the Common Law and the Civil Law: A Good Way of Discovering Some of the Most Interesting Similarities and Differences That Exist Between These Legal Families’, in Mark Van Hoecke and François Ost (eds.), *The Harmonisation of European Private Law* (Oxford: Hart, 2000), p. 133. But see, for sophisticated reflections on the necessity of attending to alterity’s specificity within the communicative and subsequent re-presentational process, Laurence Thomas, ‘Moral Deference’, (1992) 24 *Philosophical Forum* 233; Iris Marion Young, ‘Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought’, (1997) 3 *Constellations* 340, p. 362, n. 11. For a noteworthy attempt to combat the degradation of communication and elucidate a language of comparison suitably respectful of the rich texture of indigenous experiences of law which would avoid any assertion of ‘ownership’ over them by the comparatist, see Ainsworth, *supra*, note 143.

¹⁷⁰ Warren Weaver, ‘Translation’, in William N. Locke and A. Donald Booth (eds.), *Machine Translation of Languages* (Cambridge, Mass.: MIT Press, 1955), p. 18.

language as no longer to appear like a translation, it would, ultimately, be refusing to grant hospitality to alterity. Rather, the translator adapts the host language in order to accommodate alterity and thus avoids denying the entitlement of alterity to exist as alterity – the point of translation being to allow a readership to partake in diversity which cannot, therefore, be obliterated lest the idea of translation itself be betrayed.¹⁷¹ Indeed, Jacques Derrida perspicuously observes that ‘for the notion of translation, one will have to substitute a notion of *transformation*: the regulated transformation of a language by another, of a text by another’. He adds: ‘We will never have been involved and never have been involved in fact in the “transportation” of pure signifieds which the signifying instrument – or the “vehicle” – would leave intact and untouched, from one language to another.’¹⁷² Translation does not aspire to a fulfilment of the original. As Walter Benjamin puts it, ‘[i]t is evident that no translation, however good it may be, can have any significance as regards the original.’¹⁷³ In other words, the idea is to apprehend translation not as purporting to achieve unity and truth in language – that is, neither as mere interpretation of the original text nor as mere departure or licence from the original – but rather as that which repudiates the reflexivity of representation – that which disrupts, decentres and displaces representation – through the multiplication and the constant renewal and the ultimate inexhaustibility of meanings and truths. Instead of falling within the logic of sameness, translation acts as an operator of difference; it has difference-creating power.¹⁷⁴)

¹⁷¹ For a compelling argument along these lines, see Antoine Berman, *La traduction et la lettre ou l'auberge du lointain* (Paris: Le Seuil, 1999). Further reflection is offered in Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), pp. 370–88. A fascinating application of the ‘linguistics of particularity’ is found in A. L. Becker, *Beyond Translation* (Ann Arbor: University of Michigan Press, 1995), p. 71 and *passim*.

¹⁷² Jacques Derrida, *Positions* (Paris: Editions de Minuit, 1972), p. 31 [‘à la notion de traduction, il faudra substituer une notion de transformation: transformation réglée d’une langue par une autre, d’un texte par un autre. Nous n’aurons et n’avons en fait jamais eu affaire à quelque “transport” de signifiés purs que l’instrument – ou le “véhicule” – signifiant laisserait vierge et inentamé, d’une langue à l’autre’] (emphasis original). This statement was made in the context of an interview with Julia Kristeva. For an illuminating analysis of the way in which Derrida’s own work was transformed upon being received in the United States, see Peter Goodrich, ‘Europe in America: Grammatology, Legal Studies, and the Politics of Transmission’, (2001) 101 *Columbia L.R.* 2033.

¹⁷³ Benjamin, ‘The Task of the Translator’, *supra*, note 134, p. 254. The German text reads: ‘Daß eine Übersetzung niemals, so gut sie auch sei, etwas für das Original zu bedeuten vermag, leuchtet ein’: *id.*, ‘Die Aufgabe des Übersetzers’, *supra*, note 134, p. 10.

¹⁷⁴ See Stephen D. Ross, ‘Translation as Transgression’, in Dennis J. Schmidt (ed.), *Hermeneutics and Poetic Motion* (Binghamton: SUNY, 1990), pp. 25–42. I owe this citation to Simone

To appreciate the irrefragability of difference further allows comparatists to break the 'charmed circle' of functional inquiry,¹⁷⁵ that is, to move away from Zweigert and Kötz's proclamation that '[t]he basic methodological principle of all comparative [analysis of] law is that of functionality.'¹⁷⁶ Quite apart from the fact that there exist other 'schemes of intelligibility' and that it appears very strange to confine comparative legal studies to one methodological approach which would act as a kind of abecedarian narrative,¹⁷⁷ it can only be described as simplistic to regard configurations from different legal cultures as partaking in sameness merely on account of the fact that they perform the 'same', subjectively ascribed, function. I argue that functionalism – a variation on the time-honoured theme of ethnocentric projection – has become unduly attractive as a variance reducer. For instance, it 'has no eye and no sensitivity for what is not formalized and not regulated under a given legal regime'.¹⁷⁸ Crucially, functional analysis lacks a critical vocation because it betrays a fundamentally technical perspective accounting for a view of comparative legal studies as essentially utilitarian.¹⁷⁹ Functionalism offers an application of the idea of formalization, which itself can prevail only if one is prepared to discard the concrete contents of experiences and values and, ultimately, to elide the concrete law (the law that unmarries one, that has one's children taken away from one, that has one lose one's house and so forth). In other words, functionalism is a mechanistic theory which says nothing about understanding. It represents 'a scientific extrapolation and abstract accentuation

Glanert. With specific reference to law, this point is compellingly developed in Kasirer, 'Lexicographie', *supra*, note 143; *id.*, 'François Génys's *libre recherche scientifique* as a Guide for Legal Translation', (2001) 61 Louisiana L.R. 331.

¹⁷⁵ Walter Goldschmidt, *Comparative Functionalism* (Berkeley: University of California Press, 1966), p. 14.

¹⁷⁶ Zweigert and Kötz, *supra*, note 15, p. 34.

¹⁷⁷ Anyone who believes that there are no sophisticated alternatives to functional analysis could have attended with great profit a series of lectures which Professor Nicholas Kasirer delivered at the Université Panthéon-Sorbonne in February and March 2002. In the course of his presentations, Professor Kasirer examined and compared the French and English law on altruism not at all in functional terms, but by exploring how law is re-presented in a Norman McLaren film and, conversely, how law represents biblical texts in its ordinary modes of expression. For aspects of this fascinating argument, see Kasirer, 'Agapè', *supra*, note 143. For a non-exhaustive list of five alternatives to functionalism, see Samuel, *supra*, note 143, pp. 301–20 [discussing Jean-Michel Berthelot, *Les vertus de l'incertitude* (Paris: Presses Universitaires de France, 1996), pp. 78–82].

¹⁷⁸ Frankenberg, *supra*, note 114, p. 438.

¹⁷⁹ See Jonathan Hill, 'Comparative Law, Law Reform and Legal Theory', (1989) 9 Oxford J. Leg. Stud. 101, pp. 106–7.

of *one aspect* of a phenomenon simply because it has been thought through *in this form*.¹⁸⁰ Accordingly, 'the functionalist focus on the law's practical consequences neglects much of what might profitably be included as the object of comparative research'.¹⁸¹ Alan Hunt's conclusion follows: 'the universalism claimed by functionalism is an unsupported assertion which carries the dangerous implication of being likely to result in the misleading imposition of uniformity upon the diversity of social reality.'¹⁸²

The insistence on the values of alterity and authenticity must also lead the comparatist to accept that there is still, in each of the two main legal traditions represented within the European Community, an irreducible element of autochthony constraining the epistemological receptivity to globalization and fostering instead various forms of 'glocalization'.¹⁸³ It must further cause the comparatist to welcome the extent to which the syncretization at play at the European level has prompted a revitalization of the national legal heritage, a heightening of legal and cultural self-consciousness. The fact that fragments of local discourse now have their origin elsewhere does not mean that 'transnational culture' has displaced the 'traditionary culture' with

¹⁸⁰ Karl Mannheim, *Ideology and Utopia*, transl. by Louis Wirth and Edward Shils (New York: Harcourt Brace Jovanovich, 1936), p. 19 [my emphasis]. See also M. B. Hooker, *Legal Pluralism* (Oxford: Oxford University Press, 1975), p. 42: 'a demonstration in similarity in function [...] does not necessarily imply the same supporting epistemology.'

¹⁸¹ Hyland, *supra*, note 13, p. 188. For a general critique of functionalism, see *id.*, pp. 188–9. See also Großfeld, *supra*, note 114, p. 10; David J. Gerber, 'System Dynamics: Toward a Language of Comparative Law?', (1998) 46 Am. J. Comp. L. 719, p. 722, who remarks on the 'deracination' process generated by functional analysis.

¹⁸² Alan Hunt, *The Sociological Movement in Law* (London: Macmillan, 1978), p. 53. See also Fletcher, *supra*, note 76, p. 350: 'There are differences among the legal systems of the industrial world which are greater than they appear to the functionalist eye. [...] If everyone is inclined to protect tort plaintiffs, or impose pollution controls, we are inclined to believe that we are all doing the right thing. But this functional resemblance [...] remains superficial unless we know the doctrinal depths from which the instances of convergence emanate.'

¹⁸³ Roland Robertson, 'Glocalization: Time-Space and Homogeneity-Heterogeneity', in Mike Featherstone, Scott Lash and *id.* (eds.), *Global Modernities* (London: Sage, 1995), pp. 25–44. For a relevant demonstration, see Teubner, *supra*, note 143, where the author shows, on my reading of his argument, that even as the legal notion of 'good faith' is being 'globalized', cultural embeddedness continues to be strong such that the German model cannot be transferred to Great Britain because it is linked to a specific production regime – what is referred to as 'Rhineland capitalism'. Cf. Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996), p. 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.' For an exploration of some of the limits of globalization, see generally James Clifford, *The Predicament of Culture* (Cambridge, Mass.: Harvard University Press, 1988), pp. 1–17. Cf. Seyla Benhabib, *The Claims of Culture* (Princeton: Princeton University Press, 2002).

which it mixes and upon which it is superimposed. 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.'¹⁸⁴ 'Traditionary cultures' remain extraordinarily impervious to disruption so that the civil-law and common-law traditions in Europe can, even today, hardly be reduced to their cosmopolitan facets. By linking the civil-law and common-law traditions, the Treaty of Rome has in fact dramatized their historically rooted cognitive disconnections.¹⁸⁵ Propinquity has made possible a new awareness of epistemological difference – which helps to verify one of Heidegger's fundamental arguments regarding the connection between 'existence' and 'temporality'.¹⁸⁶ As a shared legal framework, far from eradicating the *summa differentia* between the two legal traditions, exacerbates it by sharpening its contours, the focus on alterity demonstrates that it is unjustifiable to advocate the jettisoning of Europe's cultural heterogeneity in the name of an instrumental re-invention of Europeanism dictated by the ethos of capital and technology (and the pathological fear of the ungovernability of ambiguity). I claim that the convergence thesis effectively perpetuates a brand of 'rightwing Hegelianism [which] conceals a stark downgrading of historical contingency and human freedom'.¹⁸⁷ It represents an attack on pluralism, a desire to suppress antinomy, an attempt at the diminution of particularity, a will to erase cultural memory in a context where the two main legal traditions within the European Community

¹⁸⁴ Edward O. Wilson, *In Search of Nature* (London: Allen Lane, 1997), p. 107. Social economists refer to the way in which cultures continue to articulate their moral inquiry according to traditional standards of justification as 'path dependence'. For example, see Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), pp. 92–100. See also Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness', (1985) 91 Am. J. Socio. 481. See generally Cass R. Sunstein (ed.), *Behavioral Law and Economics* (Cambridge: Cambridge University Press, 2000).

¹⁸⁵ Arguably, this situation offers an instance of a wider cultural phenomenon. The intensity of contact among cultural groups often has the paradoxical consequence that it stimulates cultural diversity by confirming group members in their own identity. See Geert Hofstede, *Cultures and Organizations* (London: McGraw-Hill, 1991), p. 238. Cf. Feyerabend, *supra*, note 49, p. 274: 'It is true that nations and groups within a society frequently establish some kind of contact, but it is not true that in doing this they create, or assume, a "common metadiscourse" or a common cultural bond.' For a reflection on the production of locality in a globalizing world, see Arjun Appadurai, *Modernity at Large* (Minneapolis: University of Minnesota Press, 1996), pp. 188–99.

¹⁸⁶ Heidegger's words are that 'the meaning of Dasein [human existence] is temporality': *Being and Time*, *supra*, note 48, p. 380. For the German text, see *id.*, *Sein und Zeit*, *supra*, note 48, p. 331 ['*der Sinn des Daseins ist die Zeitlichkeit*']. See also Merleau-Ponty, *supra*, note 46, p. 475.

¹⁸⁷ Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (London: Verso, 1996), p. 9. See also *id.*, pp. 72–3 and 76–7.

can best be regarded as epistemic peers, serving equally well by catering to their respective communities' specific historical needs. Indeed, 'the *duty* to answer the call of European memory dictates respect for difference, the idiomatic, the minority, the singular and commands to tolerate and respect everything that does not place itself under the authority of reason.'¹⁸⁸ And 'this responsibility toward memory is a responsibility toward the concept of responsibility itself which regulates the justice and the justness of our behaviour, of our theoretical, practical, ethico-political decisions.'¹⁸⁹ The convergence thesis thus appears as an entirely ahistorical, even anti-historical, argument.

The priority of alterity, in sum, makes it acceptable that complete *Ordnung* should lie beyond one's grasp.¹⁹⁰ It indicates that 'whatever conclusions [the comparative study of law] comes to must relate to the management of difference not to the abolition of it.'¹⁹¹ Moreover, it illustrates how the comparatist must discard one specific approach to the management of difference aptly described as 'better-law' comparison. To argue, as does the principal text in the field,¹⁹² that comparative legal studies must aim to find the 'better solution' reflects confusion and complacency. Consider the following passage from that book: '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.'¹⁹³ Is the suggestion, to quote again from the *Unidroit Principles*, that the German law of 'offer' is to be preferred '*irrespective of the legal traditions*

¹⁸⁸ Jacques Derrida, *L'autre cap* (Paris: Editions de Minuit, 1991), pp. 75–7 ['le devoir de répondre à l'appel de la mémoire européenne (...) dicte de respecter la différence, l'idiome, la minorité, la singularité (...) et) commande de tolérer et de respecter tout ce qui ne se place pas sous l'autorité de la raison'] (emphasis original).

¹⁸⁹ *Id.*, *Force de loi* (Paris: Galilée, 1994), p. 45 ['Cette responsabilité devant la mémoire est une responsabilité devant le concept même de responsabilité qui règle la justice et la justesse de nos comportements, de nos décisions théoriques, pratiques, éthico-politiques'].

¹⁹⁰ As I make this point, it is only fair to note that the question of how far one can take the notion of 'difference' does not detain me here. My view is that there exists a fundamental and irreducible epistemological difference across legal traditions which is massively more significant for comparative legal studies than any similarity at the level of posited law across legal 'systems'. For its part, Sacco's theory of 'legal formants' addresses the matter of differences concerning the formulation of posited law *within* legal 'systems' themselves. See Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law', (1991) 39 Am. J. Comp. L. 1 & 343. For some of the questions which inevitably arise if one pursues the matter further and asks oneself, for instance, whether there is a French 'accent' in music or whether Americans drive with an 'American' touch, see Douglas R. Hofstadter, *Le Ton beau de Marot* (London: Bloomsbury, 1997), pp. 40–1 and 284.

¹⁹¹ Clifford Geertz, *Local Knowledge* (New York: Basic Books, 1983), pp. 215–16.

¹⁹² Zweigert and Kötz, *supra*, note 15, p. 15. ¹⁹³ *Id.*, p. 362.

and the economic and political conditions of the countries in which [it is] to be applied'?¹⁹⁴ But how can a law be 'good' or 'better' *in and of itself*? Is it not the case that a law can only be more or less successfully responsive to particular circumstances or be more or less influential in a given environment? And how can the comparatist ever make it his business to operate a 'ranking' of different laws or experiences of law, promoting some and demoting others? Rather, comparative legal studies must favour an ecumenical appreciation of what are but equal evidential claims made by diverse laws on the world. Moreover, the advocacy of 'better-law' comparative legal studies reveals at least two fundamental contradictions in its leading proponents' own theoretical framework. First, how can it be simultaneously asserted that 'legal systems give the same or very similar solutions, even as to detail, to the same problems of life' *and* that comparatists need to identify the 'better' law, a process which must assume the repeated presence of difference across laws?¹⁹⁵ Second, how can it be stated that comparatists must 'insist on purely objective requirements' as they compare the various laws *and* choose the 'better' law?¹⁹⁶

* * *

To stress difference's *vis affirmativa*, that is, to insist on the value of difference as non-negativity or complementarity (in the sense in which different languages concur in the quest for an understanding of what we call 'reality') is to encourage oppositional discourse in the face of a strategic and totalitarian rationality which, while claiming to pursue the ideal of impartiality by reducing differences in the *Lebenswelt* to calculative and instrumental unity, effectively privileges a situated perspective (the observer's own), which it allows to project as universal. The comparatist must accept, rather than attempt to evade, the necessarily contingent – and, ultimately, determinative – character of cognitive points of departure across legal traditions. To do otherwise, that is, to relegate the cognitive asymmetries between the civil-law and common-law worlds to ignorable differences, to the realm of epiphenomena, is superficial and shows confusion between the legitimate desire to overcome barriers of communication across legal traditions and

¹⁹⁴ *Unidroit Principles*, *supra*, at text accompanying note 32 [my emphasis].

¹⁹⁵ Zweigert and Kötz, *supra*, note 15, p. 39.

¹⁹⁶ *Id.*, p. 44. I argue that comparatists need to dispense with the idea of 'objectivity'. In recognition of the fact that extrication by the comparatist from his circumstances is impossible, comparative legal studies must privilege a reflexive epistemology and foster 'reflection' as a valid category of discovery.

the presumptuous fabrication of 'black-letter' sameness severed from all its constitutive contexts. Insensitivity to questions of cultural heterogeneity fails to do justice to the situated, local properties of knowledge, which are no less powerful because they may remain inchoate and uninstitutionalized. In the way it refuses to address plurijurality at the deep, cultural level, the rhetoric of legal convergence advocated by comparatists simply forfeits intercultural and epistemological validity. The immediate goal, therefore, must be to move toward a variation on what feminists refer to as 'standpoint epistemology' – a standpoint implying a keen awareness of the material and social circumstances under which knowledge emerges and, thus, being understood as 'a hard-won product of consciousness-raising and social-political engagement' as regards the fabrication of knowledge-claims, which insists not only on context, but also on contextualization or complexification of context, that is, on the particularization of the social and institutional practices within which knowledge is formed or produced.¹⁹⁷ Not unlike women, comparatists must attempt to struggle out of their characteristic – and characteristically, in their case, rule-oriented – social position and condition.

* * *

Note that in the quest for thick or deep understanding, the comparatist must maintain alterity in its specificity while at all times avoiding the tendency to essentialize it. I repeat that I am emphatically not in search of uniquely original essences, either to restore them or to set them in a place of unimpeachable honour. It is not that a civilian, for instance, can never

¹⁹⁷ The quotation is from Lorraine Code, 'Epistemology', in Alison M. Jaggar and Iris Marion Young (eds.), *A Companion to Feminist Philosophy* (Oxford: Blackwell, 1998), p. 180. For a useful primer, see Alessandra Tanesini, *An Introduction to Feminist Epistemologies* (Oxford: Blackwell, 1999), pp. 138–59. A leading advocate of standpoint epistemology is Sandra Harding, *Whose Science? Whose Knowledge?* (Ithaca: Cornell University Press, 1991), pp. 119–37 and 165–81. An insightful application to law is offered by Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law', (2000) 27 J. L. & Society 351. For a critical overview, see Diemut Bubeck, 'Feminism in Political Philosophy: Women's Difference', in Miranda Fricker and Jennifer Hornsby (eds.), *The Cambridge Companion to Feminism in Philosophy* (Cambridge: Cambridge University Press, 2000), pp. 186–91. These various texts show, however, that the assumptions underlying standpoint epistemology cannot be imported wholesale by comparative legal studies. Yet, one can argue that the other-in-the-law must be endowed with something like an epistemic privilege, such that his theorization of 'reality' is granted most significant – albeit non-exclusive – status. The reason why the epistemic privileging cannot be exclusive is, of course, because any group can be deceived about itself and that not even the experiences of suffering or resistance, therefore, guarantee lucid knowledge of self. I am grateful to Joanne Conaghan for calling my attention to standpoint epistemology.

understand the English legal experience – or that a man can never understand womanhood.¹⁹⁸ Rather, the point is that a civilian can never understand the English legal experience *like an English lawyer* because he cannot interpret it from within the culture itself. Understanding there can be, but a *different* understanding it will *have to be* since the civilian cannot *inhabit* English legal culture: English law is something that the civilian observes while it is something that the English lawyer lives through. Note that this *décalage* between understanding and what is the case (for the English lawyer) is indeed crucial if the alterity of the other is to be preserved and if the other's self-understanding (and *Selbstverständnis*) is to be critiqued.¹⁹⁹

Not only does comparative-legal-studies-as-difference not entail essentialism, but it does not even posit a number of stable categories, discrete and monolithic heritages organically tied to specific homelands and considered best kept separate. In this respect, Clifford Geertz draws a helpful distinction between 'difference' and 'dichotomy': '[a difference] is a comparison and it relates; [a dichotomy] is a severance and it isolates.'²⁰⁰ Hence, Philip Larkin's verse: 'Insisting so on difference, made me welcome:/ Once that was recognised, we were in touch.'²⁰¹ I want to stress that the prioritization of difference does not deny their cosmopolitanism to the legal communities being studied. In other words, a focus on difference does not connote nationalism, imperialism, colonialism or isolationism, that is, something like 'cultural fundamentalism'; on the contrary, it very much allows for a transnational public sphere. Nor does comparative-legal-studies-as-differential-analysis-of-juriscultures – or differential comparison of juriscultures – challenge the complex, conflicted and mobile nature of identity. Nor, a fortiori, does it connote ethnicity or race. The fact that the concept of 'difference' can be abused by those who exaggerate the patterning of human action and fall for stereotypical or overdetermined knowledge, the fact that 'difference' may be mobilized in support of sexism and racism, the fact that even such an

¹⁹⁸ For an influential apprehension of the epistemological relevance of gender, see Carol Gilligan, *In a Different Voice*, 2d ed. (Cambridge, Mass.: Harvard University Press, 1993). See generally Mary Field Belenky *et al.*, *Women's Ways of Knowing*, 2d ed. (New York: Basic Books, 1997).

¹⁹⁹ Levinas argues that, strictly speaking, a relationship with the other must be a relation without a relation. This is because although an encounter takes place, it does not establish understanding. See Levinas, *supra*, note 74, pp. 79 and 329.

²⁰⁰ Clifford Geertz, *After the Fact* (Cambridge, Mass.: Harvard University Press, 1995), p. 28. For difference-as-relation, see also Luce Irigaray, *J'aime à toi* (Paris: Grasset, 1992), p. 133.

²⁰¹ Larkin, *supra*, note 129, p. 104.

extreme event as the Holocaust – undoubtedly the pre-eminent example of discriminatory practice in recent history – can be regarded as a form of ‘differencing’, hardly justifies jettisoning ‘difference’ as an investigative precept. Who would consider no longer resorting to the word ‘democracy’ because the USSR abused it for much of the twentieth century?

* * *

Today’s comparatists in law faculties everywhere, perhaps especially in Europe, are expected to subscribe to a script of underlying unity and transcendent universalism where particularism is assumed to be secondary and fated to play but a peripheral role in the future of human affairs. It is easy to sympathize with the desire for a more orderly, circumscribed world. The obsession to find and impose order possibly answers a most basic human drive. But it is quite another thing to underwrite the search for a monistic unifying pattern not unlike the Platonic or Hegelian belief in a final rational harmony, that is, to endorse reason acting as the corrosive solvent of custom and allegiance. And this is why the programmatic engagement that I advocate for comparative legal studies requires post-Cartesian, post-idealist, post-foundationalist moves that will resist the attempts of conservative academics to reduce alterity to sameness by way of sterile facilitations reminiscent of the *Begriff*-stricken world of nineteenth-century scholarship.

Comparison must not have a unifying, but a multiplying effect.²⁰² It must stand athwart the self-deluding investment in the excision of the incommensurable. It must avoid complicity in the disregard for different ways of doing things and the ensuing exclusion of alterity, in the refusal to recognize other worlds as other worlds. It must aim at organizing the diversity of discourses around different (cultural) forms and counter the intellectual tendency toward assimilation as already identified by Vico who observed

²⁰² For example, see Jerome Hall, *Comparative Law and Social Theory* (Baton Rouge: Louisiana State University Press, 1963), pp. 48–9, who contends that comparative analysis of law is concerned with ‘the delineation of differences against a background of similarities’; Rodolfo Sacco, *Introduzione al diritto comparato*, 5th ed. (Turin: UTET, 1992), p. 11, who observes that ‘comparison consists in measuring the differences which exist across a multiplicity of legal models’ [*la comparazione consiste nel misurare le differenze che esistono tra una molteplicità di modelli giuridici*]; Richard L. Abel, ‘Comparative Law and Social Theory’, (1978) 26 Am. J. Comp. L. 219, p. 220, who argues that ‘[c]omparison, whether spatial or temporal, allows us to measure differences in the values of our variables – an essential step in formulating and testing hypotheses.’ See generally Carol Harlow, ‘Voices of Difference in a Plural Community’, (2002) 50 Am. J. Comp. L. 339. Cf. Gilles Deleuze and Claire Parnet, *Dialogues*, 2d ed. (Paris: Flammarion, 1996), p. 179: ‘Philosophy is the theory of multiplicities’ [*La philosophie est la théorie des multiplicités*]. The words are Deleuze’s.

that '[t]he human mind naturally tends to take delight in what is uniform.'²⁰³ (That the proponents of uniformization of law aim at the crushing of the indissoluble in the grey crucible of oneness is, of course, crisply expressed in the *Unidroit Principles*.²⁰⁴) The comparatist must emphatically rebut any attempt at the extravagant axiomatization of sameness. I argue that comparatists need to recall how the diversity of legal traditions and the diversity of forms of life-in-the-law these traditions embody remain the expression of the human capacity for choice and self-creation, that is, how the differences at issue are not just superficial or technical distinctions but play a constituting role in shaping cultural identity. The (perhaps un-elucidated) attachment to a familiar legal tradition must be appreciated as a legitimate and often vital aspect of social existence which, as it helps to define selfhood, deserves to be respected.²⁰⁵ Not to be prepared to accommodate this fact, not to give legal communities and individuals within these communities their historical due, is necessarily to assimilate human beings within one legal tradition to a different way of speaking and acting and to another notion of *what makes sense*; it is to expect men and women to undergo a religious conversion – something which may not even be *possible*; it is to engage in an act of *totalization* that *neutralizes* the other. Comparison must, therefore, grasp legal cultures *diacritically* (which, once again, need *not* entail an essentialist or fundamentalist understanding of identity). Charles Taylor offers useful guidance: 'the adequate language in which we can understand another society is not our language of understanding, or theirs, but rather what one could call a language of perspicuous contrast.'²⁰⁶ Ultimately, because difference conditions identity, comparatists must indeed argue that only in *deferring* to the non-identical can the claim to justice be redeemed – a commitment which finds a pithy expression in the exigent work of the Spanish poet Antonio Machado: 'All the efforts of human reason tend to the elimination of [the other]. The other does not exist: such is rational

²⁰³ Giambattista Vico, *New Science*, transl. and ed. by David Marsh (London: Penguin, 2001), bk I, sec. 2, no. 47, p. 92 [1744]. I have modified the translation slightly. For the original text, see *id.*, *Principi di scienza nuova*, in *Opere*, ed. by Fausto Nicolini (Milan: Riccardo Ricciardi, 1953), p. 452 [*'La mente umana è naturalmente portata a dilettersi dell'uniforme'*].

²⁰⁴ *Supra*, at text accompanying note 32.

²⁰⁵ As Gadamer observes, tradition is not 'something other, something alien'. Rather, '[i]t is always part of us': *supra*, note 48, p. 282. As regards the second quotation, the German text reads: '*es ist immer schon ein Eigenes*': *id.*, *supra*, note 148, p. 286.

²⁰⁶ Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985), p. 125.

faith, the incurable belief of human reason. Identity = reality, as if, in the end, everything must absolutely and necessarily be one and the same. But the other refuses to disappear: it subsists, it persists; it is the hard bone on which reason breaks its teeth. [There is] what might be called the incurable otherness from which oneness must always suffer.²⁰⁷

* * *

I disagree with fellow comparatists who dismiss the argument for differential comparison as something like a diversionary move into obsolescence.²⁰⁸ I also disagree with those who condemn it as a brand of methodological ‘extremism’ – a time-honoured, ‘low-cost’, marginalization and silencing strategy.²⁰⁹ I trust I have shown that my claim to change the way in which comparative legal studies is performed is neither spurious nor excessive and I am prepared to let my paper speak for itself on both counts. After all, the condition of the comparatist is primordially being-toward-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.’²¹⁰ In my view, therefore, the most important objection to my plea for a new comparative ethics can only lie elsewhere. In arguing for the prioritization of difference, am I not reproducing the totalitarian thinking from which I am trying to escape? Am I not relapsing into transcendental thinking? My answer is that the way toward the singularity of the law, which is a thinking of diversity or cosmopolitanism, which is a thinking of justice, cannot be equated to a totalitarian strategy, except in the most formal (and, therefore, meaningless) sense of the term. Far from partaking in a totalitarian strategy, in fact, differential thinking is characterized by its thorough immanence to actualized, real and, therefore, discontinuous experience, such that if difference is denied, it is life and existence themselves that are denied. Therefore, differential thinking attests to ‘a gnawing sense of unfulfilledness, [an] endemic dissatisfaction with itself’. It is ‘haunted by

²⁰⁷ Antonio Machado, ‘Juan de Mairena – Sentencias, donaires, apuntes y recuerdos de un profesor apócrifo’, in *Poesía y prosa*, ed. by Oreste Macrí, t. IV: *Prosas completas (1936–39)* (Madrid: Espasa-Calpe, 1989), II, p. 1917 [‘De lo uno a lo otro (...). *Todo el trabajo de la razón humana tiende a la eliminación del segundo término. Lo otro no existe: tal es la fe racional, la incurable creencia de la razón humana. Identidad = realidad, como si, a fin de cuentas, todo hubiera de ser, absoluta y necesariamente, uno y lo mismo. Pero lo otro no se deja eliminar: subsiste, persiste; es el hueso duro de roer en que la razón se deja los dientes. (...) como si dijéramos en la incurable otredad que padece lo uno*’] (emphasis original).

²⁰⁸ For example, see Lawrence Rosen’s contribution to this book.

²⁰⁹ For example, see David Kennedy’s contribution to this book.

²¹⁰ Gasché, *supra*, note 151, p. 10.

the suspicion' that it is never differential *enough* – an anxiety hardly compatible with the reification that must accompany any totalizing frame.²¹¹

* * *

Perhaps aspects of the argument can usefully be (ampliatively) summarized at this stage. I accept that there is an important sense in which the binary distinction between sameness and difference, like all binary distinctions, must itself be rejected: to describe the other as different from the self implies a knowledge of the other by the self which, ultimately, must deny the other's position as other. Against the background of this aporia, some philosophers have sought to elaborate a non-dialectical theory of difference by developing a concept that never could have been, and never could be, included within the habitual hierarchy and that would, therefore, take us beyond it – I have in mind, for example, Derrida's idea of '*différance*'.²¹² I need not follow this route, if only because my concern is not so much to abandon the idea of 'sameness' as to reject the exclusive way in which it has been constituted by comparatists. I react to the fact that, largely since the 1900s, a powerful disciplinarian regime within the field of comparative legal studies, through a repeated assertion of enabling discursive power addressing law exclusively in terms of 'itself', despite the evidence of much broader relationships, and through an insistent denial of the overwhelming weight of a past time, has established this mobile positioning into a fixity by proving eager to strap its interpretations to the Procrustean bed of sameness. This approach has followed the modernist tradition, within which difference is conceived as chaotic on Kantian and neo-Kantian grounds and is apprehended as a flaw or as a fault line, at best as an anxiogenic form of indeterminacy. But, '[w]hat we differentiate will appear divergent, dissonant, negative for just as long as the structure of our consciousness obliges it to strive for unity: as long as its demand for totality will be its measure for whatever is not identical with it.'²¹³ I argue that the constant repetition of the all-encompassing principle of sameness as a re-presentation of desire within the law is not innocent, that it conceals as much as it reveals, that it is analytically comparable to trauma. I argue that the seemingly inexorable logic of sameness – ultimately moving from *ipse* to *idem* (that is, from 'similarity', which is, after all, a form

²¹¹ I adopt and adapt Bauman, *supra*, note 36, p. 80. ²¹² *Supra*, note 156.

²¹³ Adorno, *supra*, note 4, pp. 5–6. For the original text, see *id.*, *supra*, note 40, p. 17 ['*Das Differenzierte erscheint so lange divergent, dissonant, negativ, wie das Bewußtsein der eigenen Formation nach auf Einheit drängen muß: solange es, was nicht mit ihm identisch ist, an seinem Totalitätsanspruch mißt*'].

of difference, to ‘sameness’) – hides an active subjectivity which, at the very least, takes the form of a love of order, of an affection for normativity (must not one assume responsibility for the tendency of one’s political truth?). Yet, like all desire, the desire for oneness-in-the-law must ultimately fail because it focuses on an impossible object which can exist only as a condensed or abstract version of itself, that is, as something which it is not in fact. The point is, therefore, to avoid the cultural fusionism which ‘permits [...] the other of the “own” culture or the other of “culture” *tout court*, to be perceived no longer in its alterity but only as a variant of one’s own culture [and further] permits treating one’s own culture as a homogeneous, given fact, ignoring its internal tensions, contradictions, and struggles, and giving oneself over to the fantasy that it is a logical continuum without history and does not always *also* contain the demand to transform that history’.²¹⁴ The point is to displace the precedence of (purported) sameness-in-the-law in order to show that behind the mask of universality lies a differentiation which has been repressed and which, although unsettling to the dominant and dogmatic discourse, can be recovered in its expressive and excessive dimensions. The point is to reject a topology and propose a topography. The point is to analyse the specific as the specific. The point is to foster hyper-awareness. The point is, rather than impose a framework upon something, to derive a framework from something. The point is to impel the comparatist toward an ethical encounter with the other-in-the law.

If only because it is not a standard feature of laws to project their comprehensibility (or their validity) beyond situational barriers, laws (or the seriality of laws) mark a disjunction. As they encounter such a gap, comparatists immediately try to close it, to recuperate it into some form of coherent meaning by resorting to some rhetorical strategy. Ultimately, comparatists cannot bear too much ‘reality’, that is, they cannot accept that their clarity of vision should find itself threatened on account of instability and fluidity: ‘The *prescription* of [their] ideal operates, implicitly or explicitly, by delicate or brutal means, the *proscription* of whatever does not conform to it.’²¹⁵ Consider the omission of any mention whatsoever of Gunther Teubner’s work in Reinhard Zimmermann and Simon Whittaker’s 750-page book on ‘good faith’ – an extremely audacious gesture.²¹⁶ Difference appears as

²¹⁴ Hamacher, *supra*, note 7, p. 324 [emphasis original]. ²¹⁵ *Id.*, p. 293 [emphasis original].

²¹⁶ I refer to Teubner, *supra*, note 143, being ignored in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000).

something contingent, a quality of the merely empirical existent, a disturbance, a pre-eminent disturbance of a universal law. Therefore, comparatists resort to assimilation in order to maintain an imaginary which seems threatened, that is, they employ a strategy of narrativization inviting the reader into identification with a position of coherent and unified vision and into the narcissistic pleasures that go with this. The narrative is made to contain the narrated, the signifier is made to contain the signified. As comparatists produce a narrative space for a specific 'totalization' effect (which yields enjoyment for the comparatist),²¹⁷ this narrative space itself produces the comparatists in the sense that it acts as a condition of the comparative work's possibility. Reinhard Zimmermann, Ugo Mattei, Christian von Bar, Basil Markesinis and other *conquérants* – unreconstructed Kelsenians seeking to out-Kelsen Kelsen? – thus fearing a gap in their seamless apprehension of the world (and fearing the questioning of the canonical heritage that institutes them, through patterns of domination and, yes, repression, into the jurists they are and that structures how they re-present the world), proceed in such a way that their imaginary projects onto 'reality' with a view to minimizing the difference between fiction and non-fiction. Difference itself becomes annulled in a homogeneous whole of the different and is converted into an ultimate sameness. The goal is to tame the gaze of the other – to deny the other's voice epistemic authority – in order to assuage one's own anxious compulsion to be oneself (possibly as a result of the realization that the 'I' cannot see as the other sees, that the 'I' cannot escape the unique point of view from which he sees). How does this surreptitious (and seemingly paradoxical) strategy operate? In Europe, the basic idea is to achieve the self-cancellation of the common law via its opposite, different other. Thus, forgetting that the question is not whether one legal tradition or the other is primordial, but how legal traditions become what they are in their respective difference, Zimmermann refers to the 'European' character of English law – a kind of cannibalistic violence which is the opposite of apositionality.²¹⁸

²¹⁷ For Levinas, transmutation of otherness into sameness is, in fact, the essence of enjoyment. See Levinas, *supra*, note 74, p. 113.

²¹⁸ Zimmermann, *supra*, note 65. This point, of course, assumes the common law's waywardness. But Samuel argues that, contrary to the view which is prone to highlighting the common law's abnormality *vis-à-vis* the civil law, one can regard common-law developments as more 'normal' than what happened in civil-law jurisdictions where medieval jurists made the unlikely decision to adopt as authority an antiquated and foreign text. See Samuel, *Epistemology*, *supra*, note 143, pp. 36 and 310–11 [referring to R. C. Van Caenegem].

According to this very restricted concept, difference is determined by a relation of equalization purporting to cancel terms standing against each other. Here, the interest is in eliminating, through a reciprocal equalizing out of differences, difference itself: inclusion is really disguised exclusion. Rather than emancipate itself from identity, difference eclipses itself and yields to sameness again, to unity, to totality. In other words, difference is made to promote identity; awareness of alterity leads to self-conscious affirmation (rather than to interpellation of self). The seen becomes a scene: there emerges a space of simultaneity, all laws are co-present, the comparatist can move from one to another, from another to one, relating things, judging, knowing.²¹⁹ Without needing to argue that every difference is morally salient and without purporting to exoticize difference as absolutely 'other', I reject this syncretism, this sublation of opposites, this spurious synthesis, this annulment of contradictions, this assimilation to a formal principle of equality, this kind of Hegelian *Aufhebung*, and I argue for the need to engage in a process of interior edification, a *Bildungsprozeß*, leading to the realization that the interval that marks the (non-hierarchical) proximity between beings-in-the-law need not be apprehended as an empty void or an opaque space, but that it can be 'occupied' with wonder, attraction, admiration, desire – or, let us say, with something like *recognition*, that is, with the institution of a 'nonobjectifying and nonpossessive relation to the mysterious self-disclosure of others'.²²⁰ To paraphrase Benjamin, comparative legal studies demands a *now of recognition*,²²¹ which involves a crucial shifting of the balance from repression to recognition.

The singularity of the singular is best appreciated – indeed, can only be appreciated – when failure of desingularization is encountered. (Think of translation which, being particularly attuned to the duplicity of the signifier,

²¹⁹ See Emmanuel Levinas, *Autrement qu'être ou au-delà de l'essence* (Paris: Le Livre de Poche, [n.d.]), p. 247 [1978].

²²⁰ Huntington, *supra*, note 4, p. 17. For an argument derived from 'admiration' based on Descartes, see Luce Irigaray, *Ethique de la différence sexuelle* (Paris: Editions de Minuit, 1984), pp. 75–84. In any event, it is clear that positive encouragement of alterity requires more than mere tolerance since to tolerate the other's view means to apprehend it as coming toward one's own truth.

²²¹ See Walter Benjamin, *The Arcades Project*, ed. by Rolf Tiedemann and transl. by Howard Eiland and Kevin McLaughlin (Cambridge, Mass.: Harvard University Press, 1999), pp. 463 and 473 [Convolutes N 3,1 and N 9,7] (1927–40) [hereinafter *Arcades Project*]. For the German edition, see *id.*, *Gesammelte Schriften*, ed. by Rolf Tiedemann, vol. V: *Das Passagen-Werk*, t. 1 (Frankfurt: Suhrkamp, 1982), pp. 578 and 591–2 ['*im Jetzt der Erkennbarkeit*'] (hereinafter *Passagen-Werk*). The expression also appears in correspondence. For example, see a letter from Benjamin to Gretel Adorno in *id.*, t. 2, p. 1148 ['*Jetzt's der Erkennbarkeit*'] (9 October 1935).

shows, perhaps more strikingly than other linguistic processes, that no word exhausts that which is being described and that nothing which is being described goes into a word without leaving a remainder.) Any encounter worth the name, therefore, must assume encountering the other in all the other's singularity and recognizing 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 judgement from received certainties to disturbing experiences, that is, from a cognitive to a re-cognitive ground which, because 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), is also an ethical, political and hermeneutic ground. But, '[i]n order for the recognition of the other to be possible, there must first be respect for the other.'²²² In the words of Seyla Benhabib, '[n]either the concreteness nor the otherness of the "concrete other" can be known in the absence of the *voice* of the other' – who remains entitled to refuse derivation from self.²²³ This is why comparatists-at-law must purposively resort to quotations which, because they constitute 'the ultimate accomplishment of the mimetic or representational process',²²⁴ validate and accredit the discourse of the other, that is, produce enhanced reliability by allowing the other to be *as such* and thereby foster a measure of equipollence between their and the other's experiences. (*Quaere*: does the comparison *par excellence* not consist of a montage of one quotation next to another?)²²⁵ Nothing in this strategy denies, of course, that the carving of a quotation remains a function of the observer's choice, a fact which raises the matter of the fidelity to the observed's thought and, indeed, that of the integrity of the process as a whole. For instance, does the observed, through the quotation, assume ethical responsibility, or rather co-responsibility, for the re-presentation?

²²² Hamacher, *supra*, note 7, p. 323.

²²³ Seyla Benhabib, *Situating the Self* (Cambridge: Polity Press, 1992), p. 168 [emphasis original].

²²⁴ Louis Marin, 'Mimésis et description, ou de la curiosité à la méthode de l'âge de Montaigne à celui de Descartes', in *De la représentation*, ed. by Daniel Arasse *et al.* (Paris: Gallimard, 1994), p. 84 [*'l'accomplissement ultime du processus mimétique ou représentationnel'*]. See generally Antoine Compagnon, *La seconde main ou le travail de la citation* (Paris: Le Seuil, 1979), p. 12, who justifiably comments that 'the quotation represents capital stakes, a strategic and even political site in any practice of language' [*'la citation représente un enjeu capital, un lieu stratégique et même politique dans toute pratique du langage'*].

²²⁵ Benjamin's so-called '*Passagen-Werk*' offers a well-known illustration of such construction. For the English version, see *Arcades Project*, *supra*, note 221.

To desist from subjecting heteronomy to the logic of subsumption, to yield to that which is being described, to its value, to its dignity and to its distinction – to allow something to be seen for what it is (*‘etwas als etwas sehen lassen’*, to borrow from Heideggerian ontology),²²⁶ to allow a law to affirm itself in its difference, to permit a law to reveal itself or to come into being as meaningful by wresting it from the dominant interpretations which obscure its self-revelation – is to do justice to it because it is to engage in a process along the lines of *restitutio in integrum* (while accepting, of course, that the self can never fully overcome the epistemic partiality arising from the fact that human relations are inherently asymmetrical and irreversible).²²⁷

Needless to say, the ‘recognition’ that must be sought is emphatically not to be understood as an appropriational relation of knowledge in the sense of ‘self-recognition and self-idealization, of self-affection [...] with respect to another who is regarded as pertaining to one’s own self, as belonging to oneself alone, as reducible to oneself’.²²⁸ In other words, given that ‘individuals desire less to know the world than to recognize themselves in it, substituting for the indefinite frontiers of a fleeting universe the totalitarian security of closed worlds’, ‘the wish to know must protect itself against the need to recognize everything, which subverts it.’²²⁹ Although recognition allows the other to give meaning to my existence in addition to the meaning I myself give it, although the self can become explicit to itself only through the mediation of an other, although self-consciousness requires a constitutive relation to otherness to confirm and transform its own self-understanding and drive it beyond abstract solipsism of the ‘I am I’ type,²³⁰ the other is not to be reduced to a simple vehicle for the recovery of the

²²⁶ Heidegger, *Sein und Zeit*, *supra*, note 48, p. 33 [emphasis original]. For the English rendition, see *Being and Time*, *supra*, note 48, p. 56: ‘letting [something] be seen as something’.

²²⁷ See Fabian, *supra*, note 4, pp. 162, 158 [referring to W. J. T. Mitchell] and 171–6; Young, *supra*, note 169. See generally Charles Taylor, *Multiculturalism and the ‘Politics of Recognition’* (Princeton: Princeton University Press, 1992); Robert R. Williams, *Hegel’s Ethics of Recognition* (Berkeley: University of California Press, 1998).

²²⁸ Hamacher, *supra*, note 7, p. 290.

²²⁹ Marc Augé, *Le sens des autres* (Paris: Fayard, 1994), pp. 131 and 143 [‘les hommes souhaitent moins connaître le monde que s’y reconnaître, substituant aux frontières indéfinies d’un univers en fuite la sécurité totalitaire des mondes clos’; ‘le désir de connaître doit se prévenir contre le besoin de tout reconnaître qui le subvertit’].

²³⁰ A typically Sartrean illustration showing how the self can be ‘othered’ would be ‘shame’: I am ashamed of myself as I appear to the other, such that I am what the other sees. The other within the same prompts a re-identification and, thus, forms part of identity. Cf. Levinas, *supra*, note 219, p. 176, who characterizes subjectivity as ‘the other in the same’ (*‘l’autre dans le même’*).

self, a mere occasion for self-consciousness, a variation on the theme of my 'I-ness', an opportunity for the self-interested furtherance of self-reflective or monological identity, a maieutics: Egyptians do not owe their existence to egyptologists.

There is one more observation to be reiterated in this regard. The recognition that I advocate in order to move comparative legal studies beyond egology is not to be taken as implying the validation or certification of the other's self-disclosure: critical evaluation remains inherent to the act of comparison.

* * *

In *The Nice and the Good*, Iris Murdoch has an elderly gentleman, Uncle Theo, sitting with his twin niece and nephew while they play on the seashore. The beach is a source of acute discomfort to Uncle Theo. While the children's noise and exuberance bother him, what really makes Uncle Theo most anxious is the multiplicity of things. As if twinness was not enough of an ontological disturbance, there are on the beach all those pebbles. Because each pebble is clamouring in its particularity, the totality of them is threatening 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, Uncle Theo exhibits a plethoraphobic distaste for multiplicity and randomness. His preoccupation with perceptual and conceptual tidiness shows Uncle Theo as the primordial comparatist-at-law, that is, as someone who is dismayed and disturbed by difference.²³¹ Uncle Theo is the comparatist-at-law comparatists-at-law must learn to unbecome by adumbrating a Heideggerian attunement to the self-disclosure of law focusing not so much on the law-as-disclosed (which would mire us into yet more positivistic immiseration) as on the disclosive process itself.²³²

Clearly, what is involved in the prioritization of difference does not simply relate to the overcoming by the comparatist of obstacles that could be described as 'external' to him (such as institutional frameworks and other structures legitimating uniformity-as-performativity), but also entails overcoming the self as an agent of censorship (after all, the desire not to know about otherness-in-the-law is not simple ignorance; rather, it

²³¹ See Iris Murdoch, *The Nice and the Good* (London: Vintage, 2000), pp. 152–3 [1968]. I closely follow Elizabeth V. Spelman, *Inessential Woman* (London: The Women's Press, 1988), pp. 1–2.

²³² Cf. Thomas Sheehan, 'On Movement and the Destruction of Ontology', (1981) 64 *The Monist* 534, p. 536.

assumes a prescience of what it is that one does not want to know – which suggests that the comparatist's unknown is far from being the simple opposite of his known). In Freudian terms, *Entstellung* (distortion) must yield to *Darstellung* (re-presentation): the deformation that seeks to dissimulate its deformative character by creating a re-presentational façade, the tententious consciousness abandoning itself to wish-fulfilment – remember Markesinis enjoining comparatists to manipulate data and Zimmermann and Whittaker omitting to refer to Teubner²³³ – must yield to the problematization of complexity in terms of ambivalence and conflict, that is, to self-discipline (*Selbstüberwindung*).²³⁴

Comparatists, then, must learn that there is difference and postponement of meaning. They must favour an ethics of interruption. But, as I have argued, they must learn that there is also nearness – a process which requires much more than textual exposures and demands actual and sustained social interaction (one can know comparison only by living it).²³⁵ This is why the brand of differential analysis or comparison of juriscultures I advocate cannot fairly be attacked as a repudiation of community or as promoting the effacement of any pro-social desire by beings-in-the-law to express themselves coherently in terms of shared meanings or, more crudely, as allowing a lapse into anti-social individualism or existential nominalism and atomism. I acknowledge what Nathalie Sarraute, actually misquoting Katherine Mansfield, calls 'this terrible desire to establish contact'.²³⁶ My argument – which I address to comparatists-at-law – lies elsewhere and aims rather to *intensify* one's engagement in community through a non-repressive and non-dominating form of socialness, to prompt one to move beyond dogmatism and narcissism so as to examine how one's individuality is determined

²³³ *Supra*, at text accompanying notes 27 and 216, respectively.

²³⁴ See Sigmund Freud, *The Interpretation of Dreams*, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, transl. by James Strachey *et al.*, vol. V (London: Hogarth Press, 1953), pp. 524–5 [1900]. For the German text, see *id.*, *Die Traumdeutung*, in *Gesammelte Werke*, ed. by Anna Freud *et al.*, vol. II, t. 3 (Frankfurt: S. Fischer, 1942), p. 529.

²³⁵ This nearness also emerges from the act of writing itself. Thus, beyond the absence it inscribes (*supra*, note 157), the writing also conveys a strong sense of presence: 'One never writes (or describes) something which happened before the work of writing, but that which happens (in all meanings of the word) during this work, in the *present time* of this work': Claude Simon, *Discours de Stockholm* (Paris: Editions de Minuit, 1986), p. 25 ['l'on n'écrit (ou ne décrit) jamais quelque chose qui s'est passé avant le travail d'écrire, mais bien ce qui se produit (et cela dans tous les sens du terme) au cours de ce travail, au présent de celui-ci'] (emphasis original).

²³⁶ Nathalie Sarraute, *L'ère du soupçon*, in *Oeuvres complètes*, *supra*, note 2, p. 1568 [1964]. The quotation appears in English.

by assumptions and values and is, in fact, 'embedded within a sociality whose origin in the material and cultural forces of history is incommensurate with powers of the individual to conceptualize or to control.'²³⁷ I am, in other words, arguing for noetic comparative legal studies aiming to make manifest, celebrate, heed and interrogate the *genius loci*. The way forward for comparative legal studies – its *Denkweg* – must not lie with *Ordnung*, but rather with *Ortung*. As 'Ord' suggests 'Reihe' and 'Rang', 'Ort-' connotes 'Spitze', that is, by extension, 'Gegend' and 'Platz'. What is needed is, indeed, a focus on the law as it is situated, as it is located. What is wanted is an accentuation of the 'Ort-' of the law. Because particular experience provides the last resort for establishing a weak but respectable veracity and because it is only through the other that it is possible to get behind oneself in a manner not to be achieved simply by way of self-reflection, I am, in the end, through my call for heightened epistemological vigilance, for non-indifference to difference, disclosing a measure of epistemological optimism. I am making a plea for an economy of *indebtedness* which, alone, can help comparatists acquit themselves of the guilt they must otherwise feel on account of the stunningly insistent subjugation of the other to the self that they have been perpetrating, falling for the treacherous seductions of semblance and its constitutive exclusions, effectively removing legal relations from the field of direct experience of particular persons in their mutual involvement, compelling individuals to renounce their autonomy and assigning them to the impersonal forces of the market in legal ideas, replacing a mode of engagement with a perfectly artificial and ideological mode of construction of axiomatic patterns established through strict reference to the formalized and absolutized elements of law. Yes. The only commendable strategy for comparative legal studies today – its urgent and incessant task – is a hermeneutics attending to the constraints of contingency and facticity which features Keats's 'negative capability', a 'quality' he regarded as 'form[ing] a Man of Achievement' and which is present 'when man is capable of being in uncertainties, Mysteries, doubts'.²³⁸ In the words of Heidegger, '[t]his thing that is called difference, we encounter it

²³⁷ Cynthia Willett, *Maternal Ethics and Other Slave Moralities* (London: Routledge, 1995), p. 103. Of course, this is not to say that there is not an extent to which the individual's always-particular life-story mediates the background of symbolic and practical fore-structures against which it operates. After all, even shared cultural activities can have an idiosyncratic meaning for individuals.

²³⁸ *The Letters of John Keats*, ed. by Hyder E. Rollins, vol. I (Cambridge, Mass.: Harvard University Press, 1958), p. 193 [being a letter to his brothers, George and Tom Keats, dated 21 or 27 December 1817].

everywhere and always in the matter of thinking, in beings as such – encounter it so unquestioningly that we do not even notice this encounter itself. Nor does anything compel us to notice it. Our thinking is free either to pass over the difference without a thought or to think of it specifically as such. But this freedom does not apply in every case.²³⁹ My argument is that it does not apply in the case of comparative legal studies.

* * *

The view of comparative legal studies I defend focuses on the decisive historical interests of the comparer and of the compared. Yet, I appreciate that a brief erotic metaphor may make a more lasting impression than all that precedes. Drawing on Zygmunt Bauman, who himself derives inspiration from Emmanuel Levinas,²⁴⁰ I call for comparison as *caress*, that is, as a gesture that, like the caressing hand, remains open, never tightening into a grip, a gesture which is tentative and exploratory, a gesture which reaches toward the other without any intention of possessing the other and which acts, therefore, as an affirmation of alterity, as opposed, perhaps, to other erotic gestures of pointed invasion, a gesture which nonetheless fosters increased responsibility of the self toward the other since even as I caress the other, as I create an orifice or perhaps just a slit, an opening onto the ‘reality’ of human (or legal) diversity beyond any purportedly self-contained ‘I’ (or law), as I exceed the boundaries of self (or self-in-the-law), as I engage in exorbitance, I must answer for the impact of my gesture on the other.

* * *

There are those, no doubt, who wonder why comparative legal studies should be *something that there is a theory of*. And, even though I have purposefully attempted to engage matters ‘at ground level’,²⁴¹ there are those, no doubt, who regard this entire argument about (comparative) intelligibility being a process of differentiation as mere intellectual phantasm. Since a practical justification for this paper might be required, therefore, I shall leave it to an erudite comparatist to make the succinct point for me: in Europe, ‘the common law is being squeezed out of significant existence.’²⁴² Now, is this practical *enough*?

²³⁹ Heidegger, *Identity*, *supra*, note 137, p. 63. For the original text, see *id.*, *Identität*, *supra*, note 137, p. 55 [‘Überall und jederzeit finden wir das, was Differenz genannt wird, in der Sache des Denkens, im Seienden als solchem vor, so zweifelsfrei, daß wir diesen Befund gar nicht erst als solchen zur Kenntnis nehmen. Auch zwingt uns nichts, dies zu tun. Unserem Denken steht es frei, die Differenz unbedacht zu lassen oder sie eigens als solche zu bedenken. Aber diese Freiheit gilt nicht für alle Fälle’].

²⁴⁰ See Bauman, *supra*, note 36, pp. 92–8. ²⁴¹ Bruns, *supra*, note 150, p. 13.

²⁴² Tony Weir, *A Casebook on Tort*, 9th ed. (London: Sweet & Maxwell, 2000), p. viii.