



# Kent Academic Repository

Petretta, Ida (2021) *The question of comparison*. *American Journal of Comparative Law* . ISSN 0002-919X.

## Downloaded from

<https://kar.kent.ac.uk/85594/> The University of Kent's Academic Repository KAR

## The version of record is available from

<https://doi.org/10.1093/ajcl/avab003>

## This document version

Publisher pdf

## DOI for this version

## Licence for this version

CC BY (Attribution)

## Additional information

## Versions of research works

### Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

### Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal* , Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

## Enquiries

If you have questions about this document contact [ResearchSupport@kent.ac.uk](mailto:ResearchSupport@kent.ac.uk). Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

IDA PETRETTA\*

## The Question of Comparison†

*Comparison is a key component of legal reasoning. We move merrily from like to like within the doctrine of precedent. We invoke comparison whenever we distinguish or apply a case. This Article begins by elucidating how comparison is present in law. The Article shows how law cannot function without comparison, and how the legal world skips over the central role comparison plays in these matters. The Article explores the literature on legal comparison and draws on insights from philosophy, comparative law, and anthropology to better understand comparison in practice. This Article argues that while we are entangled in the questions of sameness and difference, of finding the function and tying together, we are still not asking the question of comparison. What is function and how is it related to comparison? Inspired by James Tully's writings, the Article explores the aspectual views of the legal world suggested by the different games of comparison. The Article draws on Stephen Mulhall's work on Wittgenstein's seeing as, aspect dawning, and aspect blindness to further ask about our relationship to comparison. The Article shows how mainstream comparisons are ontic comparisons that think togetherness through the comparatist. The comparatist steers the belonging together and (un)makes the meaning of all things in mainstream comparison. The argument builds on earlier work by Igor Stramignoni, showing how the Western legal tradition is within a kind of Heideggerian calculative thinking. The Article explores the possibility of other kinds of comparison through Stramignoni's poetic comparisons. This Article calls on us to slow down our comparisons and begin to question comparison itself.*

### INTRODUCTION

A man will be *imprisoned* in a room with a door that's unlocked and opens inwards; as long as it does not occur to him to *pull* rather than push it.<sup>1</sup>

---

\* Kent Law School, University of Kent, United Kingdom.

† <http://dx.doi.org/10.1093/ajcl/avab003>

1. LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 42e (G.H. von Wright ed., Peter Winch trans., Basil Blackwell 2d ed. 1980).

The thirteenth century gave us one of the earliest statements on reasoning in law:

If new and unusual matters arise which have not before been seen in the realm, [If like matters arise let them be decided by like, since the occasion is a good one for proceeding a *similibus ad similia*.] and their judgment is difficult and unclear, let them be adjourned to the great court to be there determined by counsel of the court, [though there are some who, presuming on their own knowledge, as though nothing connected with the law were beyond their competence, are unwilling to seek the counsel of anyone,] [since] it is more becoming and more lawyer-like to take counsel rather than to determine anything rashly, nor is it discreditable to be in doubt as to individual cases.<sup>2</sup>

The English common law emerged largely from unwritten law and local customs that varied between each county, legislation affirmed mostly what the courts were already doing.<sup>3</sup> Previous decisions were not binding, but wise judges used their own recollections of prior cases as guidance.<sup>4</sup> There was a wider movement from memory to writing in the twelfth and thirteenth centuries, which also informed legal practice, leading to increased reporting of cases.<sup>5</sup> The earliest known reports of cases detailing the words of litigants, their counsel, and judges date from 1244.<sup>6</sup> Henry Bracton made notes from two thousand

---

2. In the passage, *similibus ad similia* can be found in italic brackets because it was part of Bracton's additions and supplementary passages, taken into the text by his editor or redactor. 2 HENRY BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 21 (Samuel Thorne trans., Harvard Univ. Press 1968). Prior to Bracton, there were two twelfth-century books describing English law. See RALPH V. TURNER, THE ENGLISH JUDICIARY IN THE AGE OF GLANVILL AND BRACTON, c. 1176–1239, at 38–40 (1985). *Summae* were an attempt to organize and make sense of the many different documents in a logical way. See M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD ENGLAND 1066–1307, at 108–10 (3d ed. 2013).

3. Legal history is contested. J.W. Tubbs reexamined Bracton's writings and challenged the evidence for the view that custom was the only way of understanding the common law during the medieval period. Tubbs uncovered the role of writs in the development of the common law; he also exposed how Bracton's definitions of law and custom relied heavily on Roman law sources. See J.W. TUBBS, THE COMMON LAW MIND 1–20 (2000); Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 1), 2 OXFORD U. COMMONWEALTH L.J. 155, 157–165, 169 (2002).

4. LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 28 (2008).

5. Written records proved to be a useful tool for governing, allowing for the creation of centralized archives and as a way of memory making; for example, post-Norman Conquest, the *Domesday Book* (1086) collected the oral verdicts of thousands of jurors and translated these into Latin. Nevertheless, the oral tradition continued for more than two centuries after the Norman Conquest. See CLANCHY, *supra* note 2, at 19–44, 66. Many historians argue that Henry II, in the twelfth century, set the common law in motion by establishing a centralized institutional framework, whereas others suggest it began much later in seventeenth century. See Postema, *supra* note 3, at 157–58.

6. CLANCHY, *supra* note 2, at 100.

cases for his *summa* on the *Laws and Customs of England*.<sup>7</sup> The work has been cited as the basis for the doctrine of precedent.<sup>8</sup> Bracton liberally peppered his writings with prior cases, but the reason for this toil was to show how the more contemporary cases were distorting the earlier case law.<sup>9</sup> Consequently, our current way of moving from like to like may seem topsy-turvy when viewed through Bracton's work, since we now understand the most recent like-case *ratio* by a superior court to be binding.<sup>10</sup> Proceeding *de similibus ad similia* is often said to be a distinguishing feature of the English common law, in contrast to Roman law; and yet, it was actually a standard part of a Roman legal doctrine that emphasized the authority of a group of cases creating a precedent.<sup>11</sup> The maxim *stare decisis et not quieta movere*, meaning to "stand by things decided and not to disturb settled points," was originally found in a canonical expression.<sup>12</sup> Between the late eighteenth and nineteenth centuries, the present doctrine of *stare decisis* was adopted, assisted by the greater reporting of local cases, which also increased the importance of judicial opinions.<sup>13</sup> John Selden aptly called the common law the English Janus: every decision involves a fine balance with one face fixed on the past, while the other draws (onto) the future.<sup>14</sup> But, why must we treat like cases alike? This Article emerges from a reflection on the question of the essential, yet tacit, role comparison plays in law.

The Article seeks to show how the question of comparison is important to all legal scholars, not only those working in the field of comparative legal studies. The Article approaches the relationship between comparison and law in three distinct Parts. Part I displays the stake comparison has in the workings of law, the doctrine of precedent, legal reasoning, and legal theory by providing detailed and precise examples. The Article then delves further into the historical

7. BRACTON, *supra* note 2, at 19.

8. ALFRED DENNING, *WHAT NEXT IN THE LAW* 5 (1982).

9. TUBBS, *supra* note 3, at 19–20.

10. See GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM: 2016–2017*, at 137 (17th ed. 2016).

11. TUBBS, *supra* note 3, at 19–20.

12. Scott Hershovitz, *Integrity and Stare Decisis*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 103, 104 (Scott Hershovitz ed., 2006). See also NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 128 (2005). ("The argument from precedent says that if a statutory provision has previously been subject to judicial interpretation, it ought to be interpreted in conformity with the interpretation given to it by other courts.")

13. Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 2), 3 *OXFORD U. COMMONWEALTH L.J.* 1, 12 (2003); A.W.B. Simpson, *The Common Law and Legal Theory*, in *OXFORD ESSAYS IN JURISPRUDENCE* 77–78 (A.W.B. Simpson ed., 1973); TUBBS, *supra* note 3, at 18.

14. *Jani Anglorum Facies Altera* (1610): see J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 36 (1957); Allen D. Boyer, *Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition*, 10 *REVUE INTERNATIONALE DE SEMIOTIQUE JURIDIQUE* 3 (1997).

development of treating like cases alike to find out when and how it came to be and explores insights by legal theorists. The reader can rest assured, what follows is not an ill-conceived attempt to write an all-embracing linear history of the common law. Legal history is contested and constantly rediscovering itself. The Article does not even seek to partially reconstruct an account of the history of the common law; instead, it is an attempt to shine a light on something important, and that something will become clearer as the Article unfolds. Part II turns to examining comparison itself through the rich literature on comparative legal studies together with insights from philosophy and anthropology. The Article draws heavily on James Tully's work on Ludwig Wittgenstein to highlight the aspectual character of comparison. Part II begins by asking the literature, "What is comparison?" The Article explores comparison by embracing the common law tradition of practice, offering a glimpse into how comparison works in the unique space where law and comparison are openly present together. Part III considers the thinking underlying the current literature on comparison. It analyzes mainstream comparison, and our relationship to comparison, through insights from Wittgenstein's seeing as, aspect dawning, and aspect blindness. The Article argues that our mainstream legal comparisons are steering togetherness and approaching comparison in an ontic way. The Article explores Heidegger's insights on the ontological difference: the difference between a being and Being. Part III examines Igor Stramignoni's work on poetic comparisons, which introduces some of Martin Heidegger's later thinking to comparative law. It dwells on the distinction between calculative and meditative thinking. The argument builds on Stramignoni's work showing how the mainstream approaches to comparative law are in a Heideggerian calculative thinking. Stramignoni's work asks, can we rethink comparative law afresh?<sup>15</sup> This Article seeks to build on some of these insights by returning to language and asking the question of comparison itself. I should add, this Article does not seek to answer the question of comparison; instead, it seeks to bring to your attention how we are not yet asking the question of comparison, and why we should.

## I. THE LEGAL WORLD TURNS ON COMPARISON

### A. *Custom and Reason*

The English common law has long been a practice largely consisting of custom and reason. Sir Edward Coke and Sir John Davies, in the seventeenth century, maintained that the common law could not be reduced to writing because it was to be found in the memory

---

15. Igor Stramignoni, *The King's One Too Many Eyes: Language, Thought, and Comparative Law*, 4 UTAH L. REV. 753 (2002).

and customs of the people: it was a continuous practice.<sup>16</sup> On the one hand, customs were considered immemorial; but on the other, they were malleable. Law required a refined art of reason. It evolved as a system of laws, customs, and reason; and reason meant “reason *in the law*”: each judgment had to fit, be reasonable, and consistent with the whole of the local practice.<sup>17</sup> While reason in law can be found in medieval sources, it was only seventeenth-century writings that made the relationship explicit.<sup>18</sup> The distinction between natural reason and legal reasoning also became clearer in the seventeenth century, when judges and lawyers started reflecting a little more on the practice of law.<sup>19</sup> Sir Edward Coke famously defined law as “artificial reason”: a learned art of reasoning from within the practice of law based on experience.<sup>20</sup> It was Coke’s admiration of rhetoric that led him to distinguish “artificial reason” from natural reasoning, based on the way rhetoricians distinguish “artificial logic” from natural reason.<sup>21</sup> Today, rhetoric does not speak to us in the same way.<sup>22</sup> The fall of rhetoric can only be understood when it is situated, acknowledging both the ancient rift between Plato and the sophists, and the current scientific grounding of this age, which created binary oppositions between “true knowledge” and partial, incomplete truths informed by our prejudices.<sup>23</sup> While rhetoric may have lost its tongue, we must be careful not to uproot law from its proper home. Rhetoric and law have

---

16. Postema, *supra* note 3, at 169; Stramignoni, *supra* note 15, at 36.

17. Postema, *supra* note 3, at 178; Postema, *supra* note 13, at 10.

18. TUBBS, *supra* note 3, at 148.

19. Postema, *supra* note 3, at 157.

20. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1689–1694 (1994). The common law required a different kind of skilled reasoning: *reason in law* was the result of immersion in the practice of law; it entailed pragmatically finding solutions to legal problems in each case and with an eye to later cases. See Postema, *supra* note 13, at 2–9. Sir Edward Coke saw the common law as “nothing else but reason which is to be understood [as] an artificial perfection of reason gotten by long study, observation, and experience”: see Coke in Berman, *supra*, at 1690. Coke’s writings are a product of many years of experience, crafted through Ciceronian rhetoric, which was back in fashion in the Elizabethan age. See Boyer, *supra* note 14, at 4. See also J.H. Baker’s reflections on Coke’s writings in J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 189 (4th ed. 2011).

21. Boyer, *supra* note 14, at 32.

22. C.S. Lewis once called rhetoric “the greatest barrier between us and our ancestors”: C.S. LEWIS, *ENGLISH LITERATURE IN THE SIXTEENTH CENTURY EXCLUDING DRAMA* 61 (1994). Lewis understood the importance of rhetoric, not only in the sixteenth century, but also in the Greek world: “Nearly all our older poetry was written and read by men to whom the distinction between poetry and rhetoric, in its modern form, would have been meaningless”: *id.* at 61. Today, rhetoric has come to be a term of disparagement. See PETER GOODRICH, *LEGAL DISCOURSE STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 85 (1987); Boyer, *supra* note 14, at 10; SANDRA BERNIS, *TO SPEAK AS A JUDGE: DIFFERENCE, VOICE AND POWER* 157 (1999).

23. STANLEY FISH, *DOING WHAT COMES NATURALLY* 472–501 (1989).

always belonged together: the first known teachers of rhetoric taught the first rule-based methods for handling judicial disputes.<sup>24</sup>

### B. *Deciding Like Cases Alike*

Proceeding from like to like has always been at the heart of legal reasoning.<sup>25</sup> Bracton's advice to move from like to like in law remains sound, but we would also need to go back further to find the source of *a similibus ad similia* in Aristotle's writings.<sup>26</sup> For Bracton, deciding like cases alike was a principle of interpretation known as the "equity of a statute," which extended the statute beyond its literal words to situations of "mischief" equal to those covered by the statute.<sup>27</sup> The equity of a statute, a form of analogical reasoning, enabled the law to extend itself into a new situation without exposing itself. In short, it

---

24. The first known teachers of rhetoric—Gorgias, Corax, and his pupil Tisias, in Greek Sicily—taught methods for handling judicial disputes. There were no public prosecutors; citizens had to argue their own cases in a single speech, hence the focus on being able to articulate oneself coherently. See BRIAN VICKERS, *IN DEFENCE OF RHETORIC* 6 (2d ed. 1997). See also THOMAS M. CONLEY, *RHETORIC IN THE EUROPEAN TRADITION* (1990). Law has always been linked to rhetoric. Sixteenth-century sources show those who studied at the Inns of Court studied Ciceronian rhetoric. There are also many different scholarly works on rhetoric and the law from the same period: see PETER GOODRICH, *LANGUAGES OF LAW FROM LOGICS OF MEMORY TO NOMADIC MASKS* 92–93, 102 (1990). We will forgo a detailed analysis of the fundamental relationship between law and rhetoric, as much has already been written on this subject. See, e.g., BERNS, *supra* note 22; GOODRICH, *supra* note 22; Boyer, *supra* note 14, at 10.

25. Judges use inductive reasoning and reasoning by analogy to decide cases. At first glance, it may seem that legal reasoning requires deductive logic to apply the established legal principle to the facts of the case. The ratio (general principle) of a case is never explicitly separated out from a previous case and applied mechanically; rather, the ratio of the previous relevant case is determined by the judge in the current case based on the particular facts of the prior case. See SLAPPER & KELLY, *supra* note 10, at 502–03. Legal reasoning involves analogical reasoning from one case to the next: see LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005). Gerald Postema also shows how analogical reasoning is found throughout the legal system since the medieval period; it can also be found in the construction of statutes by way of the *ejusdem generis* doctrine. See Gerald J. Postema, *Analogical Thinking in Law*, in *COMMON LAW THEORY* 102, 103–04 (Douglas Edlin ed., 2007). See also CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 62, 62 (1996) ("Much of legal reasoning is analogical: is case A like case B? Or instead like case C?"). Cass Sunstein suggests that reasoning by analogy in law has four overlapping features: (i) principled consistency, (ii) focus on particulars, (iii) incompletely theorized judgments, and (iv) principles operating at a low or intermediate level of abstraction. SUNSTEIN, *supra*, at 67–69. Not all legal theorists share the view that analogical legal decision making is a distinct, acquired craft. Larry Alexander and Emily Sherwin argue that judges have no special decision-making tools; rather, judges resolving disputes by analogy intuitively perceive similarities between cases or apply rules of similarity using ordinary reasoning. See ALEXANDER & SHERWIN, *supra* note 4, at 104, 234. An interesting recent development and approach to analogical legal reasoning (ALR) has been the use of empirical data analyzing U.S. maritime salvage cases to create a formal model of judicial behavior in this area. See Joshua Teitelbaum, *Analogical Legal Reasoning: Theory and Evidence*, 17 *AM. L. ECON. REV.* 160 (2015).

26. Reasoning from part to part and from like to like can be traced to Aristotle's *Prior Analytics and Rhetoric*. See RICHARD MCKEON, *THE BASIC WORKS OF ARISTOTLE* 103 (2001); See Postema, *supra* note 25, at 106.

27. TUBBS, *supra* note 3, at 40; POSTEMA, *supra* note 25, at 102.

provided the law with a way to bridge the gap created by the new situation of “equal mischief.” Yet, there was no general theory explaining how the “equity of a statute” concept worked, or how situations of “equal mischief” were defined.<sup>28</sup> Alas, we are left to wonder what it was that made one case of “equal mischief” warrant the application of a statute where it did not literally belong: What was “alike” and why?

A precedent can function either as a rule or an analogy, depending on the similarities and differences between the present case and the precedent.<sup>29</sup> Prior decisions deemed similar to the present case are relevant, and often prove pivotal to the way in which the present case is decided.<sup>30</sup> Where there are significant dissimilarities between the current case and the precedent, a court may choose to distinguish a precedent and create a new path. It is self-evident how the law moves from like to like, but one cannot simply say so; it must be shown in what follows. For example, one of the basic elements necessary for criminal liability, *mens rea*, can be found through likeness. The doctrine of transferred malice shows how a defendant can be found guilty of an offence where she intended the *same* crime against two different victims: for example, the defendant strikes *X* with a belt but also strikes *Y* (*Latimer*); transferred malice cannot apply where the defendant intended a *different* offence than the one committed; for instance, a defendant throws stones at *X* but misses, hitting a window (*Pembliton*).<sup>31</sup>

The way law moves from like to like can be traced through the different ways similarities and differences have played an important role in cases interpreting the *mens rea* element for recklessness. To be as succinct as possible, we will focus on three main cases: the *Cunningham* test for recklessness (subjective), the *Caldwell* test (objective), and again *Cunningham* via *G* (objective).<sup>32</sup> *R v. Cunningham*

28. The “equity of a statute” concept has been traced back to Bracton. It was widely applied in the fifteenth century; however, later texts (the Year Books) did not disclose any further explanations about how it worked. See TUBBS, *supra* note 27, at 40–41.

29. SUNSTEIN, *supra* note 25, at 71–72.

30. *Mirehouse v. Rennell* (1833) 6 Eng. Rep. 1015; 1 Cl & Fin 527, 547 (UK) (“Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.”).

31. *R v. Latimer* (1886) 17 QBD 359, 361 (UK); *R v. Pembliton* (1874) LR 2 CCR 119, 122 (UK).

32. *R v. Cunningham* [1957] 2 QB 396 (UK); *R v. Caldwell* [1982] AC 341 (HL) (UK); *R v. G* [2003] UKHL 50, [2004] 1 AC 1034. There are many other significant cases. This Part is only meant to provide a basic overview, showing how the law moves from like to like; it will not provide a comprehensive analysis of the case law in this complex area. The examples are merely the tip of the iceberg, illustrating how the law moves from like to like.

refined and developed a “subjective” test for recklessness: to be reckless, the defendant would have had to appreciate that there was a risk that someone’s property might be damaged and yet commit the act anyway.<sup>33</sup> *R v. Caldwell* distinguished the previous case of *Cunningham* as having “no bearing” on the meaning of “reckless,” as Parliament had recently replaced the earlier legislation which grounded the *Cunningham* test.<sup>34</sup> A new test was devised by Lord Diplock:

In my opinion, a person charged with an offence under section 1 (1) of the Criminal Damage Act 1971 is “reckless as to whether any such property would be destroyed or damaged if” (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it. That would be a proper direction to the jury; cases in the Court of Appeal which held otherwise should be regarded as overruled.<sup>35</sup>

This became known as the *Caldwell* test, and was widely viewed as changing the test for recklessness in *Cunningham* from a subjective test to an objective standard.<sup>36</sup>

---

33. The Malicious Damage Act 1861, 24 & 25 Vict. c. 97 (UK), had caused some confusion with the word “maliciously,” so there were many cases to refine this technical term, culminating in *R v. Cunningham*. *Cunningham* approved a definition formulated in 1902 by Courtney Stanhope Kenny:

In any statutory definition of crime, malice must be taken . . . as requiring either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).

Quoted in *Caldwell*, [1982] AC at 351 (Lord Diplock); *Cunningham*, [1957] 2 QB at 398.

34. Parliament replaced the Malicious Damage Act 1861 with the Criminal Damage Act 1971. The new Act provided an opportunity to tidy up the previous, impractical distinctions and revisit the meaning of recklessness. See Criminal Damage Act 1971, c. 48, § 1 (UK); *Caldwell*, [1982] AC at 351. Lord Diplock, in *R v. Caldwell*, did not see why there needed to be a distinction between someone who had foreseen the risk and continued anyway, and a person who had not thought about the risk to others of his act, as these were both blameworthy, and only the accused would know his/her thought processes. See *Caldwell*, [1982] AC at 352.

35. *Caldwell*, [1982] AC at 354 (Lord Diplock).

36. Cath Crosby, *Recklessness: The Continuing Search for a Definition*, 72 J. CRIM. L. 313 (2008); Kumaralingam Amirthalingam, *Caldwell Recklessness Is Dead, Long Live Mens Rea’s Fecklessness*, 67 MOD. L. REV. 491 (2004); JOHN CHILD & DAVID ORMEROD, SMITH, HOGAN, AND ORMEROD’S ESSENTIALS OF CRIMINAL LAW (2d ed. 2017). Those commenting on *Caldwell* have mostly critiqued the approach taken. A few writers have praised Lord Diplock’s approach in *Caldwell*, but they have suggested it should not have been widely applied. See, e.g., Amirthalingam, *supra*.

The *Caldwell* test was applied in *Elliot v. C*, where a fourteen year old had poured white spirit on the floor of a shed and set it alight, destroying the shed.<sup>37</sup> During the trial, it was submitted that the subjective test should be applied to establish whether this particular fourteen-year-old defendant appreciated the fact that there was an obvious risk of setting the shed on fire. She did not appreciate the risk, therefore, she was found not guilty of arson.<sup>38</sup> This decision was reversed, because the *Caldwell* test required that it be an “obvious risk” to a reasonably prudent person and not necessarily to the particular defendant.<sup>39</sup> Goff, L.J., reluctantly applied *Caldwell*, feeling compelled to follow the precedent of the House of Lords, because the *Caldwell* decision was deemed similar to the facts in *Elliot v. C*.<sup>40</sup>

We may feel some dissatisfaction with the way in which *Elliot v. C* was decided, especially when it is compared with the similar case of *R v. G*, which also concerned children.<sup>41</sup> In *G*, the defendants had set fire to some newspapers in a large plastic bin, causing damage costing one million pounds; they were charged and convicted of arson.<sup>42</sup> The House of Lords quashed their conviction, and revisited the *Caldwell* decision. The *Caldwell* decision was critiqued because it had failed to follow the intentions of Parliament when it treated *Cunningham* as irrelevant to the construction of “reckless”. The *Cunningham* test had been endorsed by a law commission report discussing the new act, and Parliament had not specified any other meaning of “reckless.”<sup>43</sup> The House also noted the *Caldwell* decision was a “radical departure” from the previous law.<sup>44</sup> Given the fact that *Elliot v. C* and *R v. G* involved children and a similar act, and the fact that like cases should be decided alike, we may view the different outcomes in these decisions as undesirable. These cases illustrate the problem: What is it that tips the fine balance, causing us to find the well-trodden path of past decisions inadequate to address our current problem? Did Lord

37. *Elliot v. C (a Minor)* [1983] 1 WLR 939, 943–44 (UK).

38. The risk was not obvious to the defendant. The defendant had not thought about the risk, or handled white spirit before, and she also had a learning difficulty. *See id.* at 945.

39. *Id.* at 945.

40. *See id.* at 947–48 (Goff, LJ).

41. *R v. G* [2003] UKHL 50, [2004] 1 AC 1034 (UK).

42. Contrary to the Criminal Damage Act 1971, § 1(1). The trial judge was bound to follow the *Caldwell* test, and no allowance was given for age or immaturity. The Court of Appeal dismissed the appeal: *R v. G*, [2004] 1 AC at 1034–43.

43. Lord Bingham examined how Parliament intended for the term “reckless” in the 1971 Act to be interpreted, by turning back to the Law Commission report and looking at why the changes were made to the legislation. Lord Bingham found that the *Caldwell* judgment had misinterpreted the law, *R v. G*, [2004] 1 AC at 1054. Lord Bingham also pointed to other failings in the *Caldwell* approach: the basic rule of criminal law *actus non facit reum nisi mens sit rea*, the obvious unfairness in subsequent cases bound to apply *Caldwell*, and the concerns expressed by academics and judges, *id.* at 1055. *See also id.* at 1058–59 (Lord Steyn, concurring).

44. *Id.* at 1062 (Lord Steyn).

Diplock see too many differences where there were few? What is the breaking point, where something becomes so radically different that it is no longer part of the continuous evolution, but warrants a new beginning? How many differences do we need to cross the Rubicon? And why, exactly, do like cases need to be treated alike? The doctrine of precedent, where like cases are decided alike, is one of the instances to first make comparison visible in the legal world.

### C. *Sustaining Integrity*

Comparison is omnipresent in precedent and it also creeps into our justification for it. For Ronald Dworkin, between justice, fairness, and due process lies integrity.<sup>45</sup> Integrity does what justice and fairness cannot do by justifying precedent. Integrity explains why we do not resort to checkerboard solutions of justice, where like cases are not decided in a similar manner, even when these have an internal fairness.<sup>46</sup> Essentially, “checkerboard” is where like is not treated alike for arbitrary reasons. Integrity is not simply about repeating past decisions; it is a commitment to a common coherence and an understanding of how previous decisions should influence the present.<sup>47</sup>

45. Dworkin divides integrity into two practical principles: (i) integrity in legislation, which requires those creating law keep law coherent in principle; (ii) integrity in adjudication, which requires those deciding what the law is and enforcing it act in a coherent manner. Integrity in adjudication explains why the past has a special power in court. “It explains why judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one, with nothing but a strategic interest in the rest”: RONALD DWORIN, *LAW’S EMPIRE* 167 (1998).

46. *Id.* at 180–83. “Checkerboard” is where the law treats similar situations differently. *See id.* at 179 (“Most of us, I think, would be dismayed by “checkerboard” laws that treat similar accidents or occasions of racial discrimination or abortion differently on arbitrary grounds.”). “Checkerboard” statutes are problematic because they breach the ideal of integrity. The United States Constitution, at its inception, with the counting of slaves as three-fifths all other persons is one of Dworkin’s examples of a “checkerboard” statute. *Id.* at 184. When thinking about why we oppose “checkerboard” statutes Dworkin comes to the ideal of integrity. Dworkin suggests that integrity is law’s Neptune because we can only make sense of the behavior of the other planets (justice and fairness) if we recognize the presence of another undiscovered planet (integrity). *Id.* at 183. For a detailed explanation of Dworkin’s notion of “checkerboard” solution, see Dale Smith, *The Many Faces of Political Integrity*, in *EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORIN*, *supra* note 12, at 119, 120–25.

47. Gerald Postema identifies six main components of the idea of integrity: (1) integrity is a norm of unification, and those bound by integrity view the community as a single moral agent; (2) integrity draws together principles and norms from past decisions: it asks for internal justification; (3) integrity seeks principles of justice and fairness; (4) integrity calls on officials and citizens to view their practice as a coherent (i.e., intelligible) set of principles (in a weak sense), in other words, integrity views coherence as an ideal; (5) integrity is historically situated, and takes past decisions as a point of departure; (6) integrity requires officials and citizens to find common, public principles of justice in their shared past. *See* Gerald J. Postema, *Integrity: Justice in Workclothes*, in *DWORKIN AND HIS CRITICS* 291, 294–95 (Justine Burley ed., 2004). Postema does not simply outline Dworkin’s theory of integrity; there are many aspects where he disagrees with Dworkin’s approach. For example, Postema suggests integrity should have a self-critical attitude which he calls “regret”: without this element, the interpretation of our past is “disengaged.” Dworkin’s postulate of showing legal practice in its “best light” sees those elements of the practice that do not fit the interpretation as “mistakes,” rather than essential features of the practice. *Id.* at 296–97.

Judges are constrained by the need to show the law in its best possible light, and any new interpretation must “fit” the existing legal practice and past decisions.<sup>48</sup> Integrity is a way of rooting new decisions in, and fitting them within, previous decisions of the law.<sup>49</sup> Integrity is a commitment displayed over time.<sup>50</sup> The idea is that we want the state to act as a moral agent with a coherent set of principles.<sup>51</sup> Such a commitment to coherence and integrity, still requires comparison. Judges committed to integrity justify their decisions on the basis of certain similarities between the current case and the previous cases; or else they distinguish a previous case on the basis of a difference, before referring to another case they deem similar.<sup>52</sup> Integrity keeps the narrative going, but only through comparison. The workhorse is comparison, and integrity is sustained by it; and yet, it would seem integrity has a binding force that comparison does not. Gerald Postema summarizes how integrity in law informs current decisions:

---

48. *Id.* at 225–38; Costas Douzinas et al., *Is Hermes Hercules’ Twin? Hermeneutics and Legal Theory*, in *READING DWORKIN CRITICALLY* 123, 134–35 (Alun Hunt ed., 1992). Dworkin refines constructive interpretation into three main stages of interpretation: (i) the pre-interpretive stage: a judge selects her materials, whereby the rules and standards of the practice are identified; (ii) the interpretive stage: the interpreter settles on a general justification for the main elements selected in the pre-interpretive stage; (iii) the post-interpretive stage, or a reforming stage, allowing the interpreter to adjust her arguments made in the interpretive stage to serve what the practice “really” needs. *See* DWORKIN, *supra* note 45, at 65–66. Dworkin concedes that actual interpretation is less deliberate and consists of “seeing” the dimensions and the purpose/aim of the practice. *Id.* at 66–67.

49. DWORKIN, *supra* note 45, at 228. *See also id.* at 255 (“Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and the legal doctrine of their community. They try to make that complex structure and record the best these can be. It is analytically useful to distinguish different dimension or aspects of any working theory. It will include convictions about both fit and justification.”).

50. When we examine a person’s actions as a whole, integrity emerges as commitment to a coherent moral view. In the same way, we want people to act in a principled way towards us, even if acting in a principled and morally coherent way does not mean that people always act in the right way. *See* Hershovitz, *supra* note 12, at 114 (“Someone who acts with integrity may nevertheless do something she ought not to do from time to time. But someone who acts without integrity, someone who acts incoherently or capriciously in matters of importance, simply cannot be acting morally except by happenstance. A lack of integrity signifies a lack of a commitment to act morally.”). Courts can also display integrity through time when we examine its decisions as a whole and find a pattern of coherent and defensible decisions: *id.* at 115.

51. DWORKIN, *supra* note 45, at 166.

52. Integrity was a third position between formalism and realism. Integrity was a way of reconciling Dworkin’s view of law as a closed system with some liberal freedom. *See* Douzinas et al., *supra* note 48, at 133. There are many important disagreements between Dworkin and other theorists in the field which will not be addressed. For instance, Douzinas et al. showed how Dworkin’s theory of interpretation was an impoverished Gadamerian hermeneutics. *See id.* at 135. Stanley Fish and Ronald Dworkin disagreed about the difference between “explaining” and “changing.” *See* STANLEY FISH, *Working on the Chain Gang*, in *DOING WHAT COMES NATURALLY*, *supra* note 23, at 87; STANLEY FISH, *Wrong Again*, in *DOING WHAT COMES NATURALLY*, *supra* note 23, at 103.

Law is a framework of practical reasoning that anchors the public justification of decisions and actions to past communal decisions and actions. This is not exclusively true of reasoning from precedent, but it is most clearly and immediately evident there. Reasoning from precedent by analogy is not mere imitation, nor is it a matter of prediction, nor some version of formal consistency. It is an evaluatively informed assessment of the normative significance of the past decision for the instant case, as well as of the significance it might hold for the future.<sup>53</sup>

Still, we do not simply stumble over the inherent similarity between two cases. Similarity between one case and another is *argued for*; in other words, it has to be established, it is a relational argument which can be disputed by a later case or by another judge.<sup>54</sup> Similarity is not simply “there” in a case for a judge in a later case to find it. It is an *assessment* of which previous case is similar and pertinent to the present circumstances. Dworkin does not deny that there are many disagreements about whether a particular rule or principle should be cited; indeed, he acknowledges, “the argument *for* a particular rule may be more important than the argument *from* that rule to the particular case.”<sup>55</sup> Again, we could ask the same questions: how similar does a case need to be in order to be relevant and significant, and when can we say that something is so radically different as to be distinguished from previous cases? Dworkin’s argument is that despite the disagreements among judges about which rule or case applies, they all agree that earlier decisions do exert a gravitational pull.<sup>56</sup> So, where does the gravitational force from previous cases come from? Writing in *Law’s Empire*, the later Dworkin would say the force was a manifestation of integrity and that integrity is both something more and less than consistency.<sup>57</sup> Integrity is helpful to explain why past decisions should inform our current actions and why we cannot settle for checkerboard solutions. However, in asking how integrity works, we go straight back to debates about similarities and differences and to comparison. Questions generated by comparison seem to be of little interest. What is the relationship between comparison and integrity?

---

53. Postema, *supra* note 47, at 312.

54. FISH, *supra* note 23, at 94.

55. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 112 (1977).

56. *Id.*

57. DWORKIN, *supra* note 45, at 219 (“Is integrity only consistency (deciding like cases alike) under a prouder name? That depends on what we mean by consistency or like cases. If a political institution is consistent only when it repeats its own past decisions most closely or precisely in point, then integrity is not consistency; it is something both more and less. Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation. An institution that accepts that ideal will sometimes, for that reason, depart from a narrow line of past decisions in search of fidelity to principles conceived as more fundamental to the scheme as a whole.”).

How are they linked? How does comparison allow integrity to function? And why does comparison lie in integrity? These are not questions receiving too much attention. It could be just that there is little to say about comparison, but then, we would have already decided its place and function as a helpful tool.

In an earlier text, Dworkin offers a slightly different answer to the question, *Where does the gravitational force from previous cases come from?*

The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way.<sup>58</sup>

Early Dworkin finds the gravitational pull of previous cases in the fairness of treating like cases alike, that is, by comparison. A similar previous decision, thanks to its status as history, provides sufficient reason to ground the decision in a later case. Dworkin's earlier and later positions can be reconciled, reflecting on why like cases should be treated alike: the later Dworkin finds integrity. In any case, comparison is prevalent in and thusly has a relationship to these all. Yet, comparison is seldom discussed; and if it is at all considered, it is seen as a vehicle for integrity, making it possible to treat like cases alike, without, however, being worthy of further questioning. Why does comparison reside in, and in-between, justice, fairness, and due process?

#### D. Courtroom Comparisons

The legal world seems saturated with comparisons. Comparison is embedded in the language of the court room. Reformulating what people say in the courtroom occurs frequently because it is a controlled sphere; discourse must follow a preestablished course; one must speak at appropriate times and in the language of the court.<sup>59</sup> Reformulation not only masks an imbalance of power between the one speaking and the one subtly correcting, but it also requires comparison. Recent

58. DWORKIN, *supra* note 55, at 112–13. Dworkin distinguishes between (a) the enactment force of a precedent, which requires later judges to follow the rules/principles in the earlier cases as if these were laid down in statutes, and (b) the gravitational force of precedents, which “tugs on later cases that are plainly beyond the language of any such rule or principle”: *see id.* at 318. There is a helpful section in Dworkin's reply to Greenwald's critique where Dworkin clarifies his notion of “gravitational force.” *Id.* at 113, 318–22.

59. GOODRICH, *supra* note 24, at 193–208. *See also id.* at 197 (“Paraphrase, of course, may involve either a relation of equivalence or symmetrical substitution between elements (words, expressions, propositions) such that the elements *a* and *b* “mean the same thing” in the relevant discourse, or a relation of implication or orientated substitutability such that the relation of substitution *a* to *b* is not the same as the relation *b* to *a*.”).

studies have shown the power of questioning as a tool to create tweaks in the complainant's account that help create a narrative the defense wants to push.<sup>60</sup> In addition to courtroom comparisons, there are comparisons between judgments, consisting of a highly selective recall of relevant "facts."<sup>61</sup> Comparison is at the center of every judgment. The adversarial legal system cannot function without comparison. When deciding a case, there is a weighing up, a comparison, of the arguments to see whether the defense or the prosecution has the stronger case. Judges often have differences of opinion, and there are many dissenting opinions and arguments that are "weighed" or "balanced" against one another in law.<sup>62</sup> The idea of judges weighing up legal arguments and past decisions is not in itself enough to guide judges in reaching a decision.<sup>63</sup> Again, what tips the balance one way or another? What is implied in weighing up?<sup>64</sup> Comparison is part and parcel of our apothegm: *like cases should be treated alike*. Comparison is a key component of legal reasoning. We move from like to like within the system of precedent. Whenever we apply or distinguish a case, we are doing comparison. Law conceals its comparisons. Whenever law talks of "reasonableness," it speaks of comparison. Reasonableness requires

60. John M. Conley and William O'Barr highlight the power imbalance, showing how defense lawyers cross-examining complainants develop narratives through their questioning. The book includes excerpts of court transcripts; one extracts shows how the complainant's words are "upgraded" by the defense lawyer, from "very smug" to "arrogant" to help create the narrative that the alleged victim was scorned and sought revenge. JOHN M. CONLEY & WILLIAM M. O'BARR, *JUST WORDS: LAW, LANGUAGE AND POWER* esp. 15–38 (2d ed. 2005).

61. Sandra Berns highlights how the facts of a case can be constructed in a multiplicity of ways leading to different legal implications. See BERNs, *supra* note 22, at 176–83.

62. MACCORMICK, *supra* note 12, at 337.

63. ALEXANDER & SHERWIN, *supra* note 4, at 102. Legal texts and proceedings are not simple or unitary, within legal proceedings there comes the moment: "[W]hen no testimony remains to be given; no argument remains to be put. All is in the balance, awaiting judgment. If the judge is to be 'properly judicial' she has no alternative but to act": BERNs, *supra* note 22, at 162.

64. See *id.* at 166–67 ("On every side arguments are offered, this explanation rather than that, these authorities in preference to those, this truth in preference to that. At the moment of judgment, what had been fecund and plural becomes singular, unitary. Only at the moment of judgment (and only where the decision is that of a single judge) can this singularity be sustained, even for a moment. Once the judge must herself justify her decision, construct written arguments which have the potential to persuade her sister judges that her decision is proper fecundity returns as she seeks ways of justifying her decisions to others, shapes arguments and reasons which will persuade them. Generations of law students have embarked upon a quest for the *ratio decidendi*, the reason for judgment, and the single authoritative sentence that epitomises law. Yet reason is seldom, if ever, as perspicacious as this endeavour suggests. Allusion, image, the dense accretion of fact and symbol and argument, the weaving of these into a whole which (if successful) draws the mind irresistibly in a particular direction: all of these highlight the rhetorical structure of the written judgment. Those who attempt to reduce plurality to singularity are likely to be unable to capture the reasons why a particular judgment is, or is not, persuasive. Even more to the point, their efforts are likely to be frustrated by the shade and play of meaning in the judgment, the half formulated second argument, the absence of the kind of precise singularity they are seeking.").

comparison to measure up  $X$ 's actions with the actions of reasonable person  $Y$ , to find out whether  $X$  was reasonable under the circumstances.<sup>65</sup> Comparison also makes its presence felt in our political sphere, where groups are demanding recognition between and within communities. Comparison is fundamental to our political lives, as it determines how we identify ourselves as belonging to certain groups and how we distinguish ourselves from other groups. Comparison is also important for legal, moral, and logical consistency. The law could not function without comparison; and yet, the legal world has not quite given comparison the attention it deserves. Despite the abundance said about comparison and law, we have not yet begun questioning fully the stakes comparison has in these matters.

An attentive reader might be thinking that it is well and good to discern a relationship between comparison and the law, but, so what? Well, that is partially my point. Comparison itself is seldom seen as significant; more often we encounter it uncritically as a useful tool. Questioning comparison is not only an acknowledgement that comparison underpins our system, but also that it challenges the status quo: how we find moral consistency and how we “do” law. Questioning comparison is questioning that upon which the legal world turns. Despite the plethora of manifestations of comparison throughout the legal world, it is somewhat baffling how it has side-stepped serious attention. While mainstream jurisprudential writings do consider judicial reasoning meticulously, questions raised by the notion of comparison have not been explored. Little has been said about the role of comparison in law, what comparison is, or how it came to be so ubiquitous.

Given how central comparison is to law, this Article seeks to thoroughly examine the literature on legal comparisons. The Article seeks to explore comparison using the common law tradition: How does comparison work? Comparative law seems to be a fitting place to begin this investigation, as it is a dynamic discipline where comparison and law are most visibly present together, thus one would expect to find comparison addressed squarely. We begin by asking the comparative law tradition: *what is comparison?* Moving through the literature, the Article will bring insights from philosophy and anthropology to the conversation in order to better understand the notion of comparison.

---

65. Neil MacCormick, *Reasonableness and Objectivity*, 74 NOTRE DAME L. REV. 1575–76, 1578 (1999) (“In the spectrum from purely descriptive to purely evaluative, “reasonable” seems to belong more toward the evaluative than the descriptive pole, not that there is no element of the descriptive in it. If I say that the care manufacturers took in manufacturing some article fell short of the care it would have been reasonable for them to take in the given setting, I am not describing the care they took or failed to take, I am evaluating the care they took. I am *comparing* what was done with what could have been done, and assessing whether a reasonable evaluation of the risks would have left an actor in that situation satisfied with the degree of care that was taken, or not so satisfied.” (emphasis added)).

There are undoubtedly constraints and limitations that arise in any review of the literature. We cannot possibly address every approach to comparison. There are multiple approaches even by the same author, as the author refines and develops his thoughts throughout his writings. This is not claiming to be an all-encompassing review of everything ever written on comparison. The purpose of this review is to seek out what comparison is, to find how each approach discussed thinks about comparison, and what the thinking underlying each approach is.

## II. WHAT IS COMPARISON?

### A. *Functional Equivalence*

Comparison requires a comparatist to bring things together into a kind of unity. If you are a functionalist, then you will see function as the common point, but how does this work? For the functionalist comparatist, what needs to be the same is that the laws selected be doing the same thing in each legal system under comparison, in other words that they be functionally equivalent. The presupposition at the center of the basic principle of functional equivalence is *praesumptio similitudinis*, which assumes that every social community shares similar problems and that each society solves these problems with similar results.<sup>66</sup> For example, many societies were faced with the need to create human milk legislation after various technological advances enabled a greater separation between the female body and the milk product. One of the pivotal moments of disembodiment came about in the 1920s, with the invention of the electric breast pump, which paved the way for breast milk to become a standardized product.<sup>67</sup> Mathilde Cohen examined the different approaches to human milk legislation in France and the United States. In France, human milk banking began in the early twentieth century and was based on the 1890s *Goutte de lait* movement that provided safe cow's milk for babies. After World War II, human milk banks were seen as a public health issue and heavily regulated.<sup>68</sup> The sale of human milk is still heavily regulated and can only be processed and distributed by lactariums; human milk is categorized as a bodily part, like an organ, and cannot be sold.<sup>69</sup> In contrast, in the United States, milk banks were organized by private individuals and with limited state intervention; formula was a more popular alternative than milk banks.<sup>70</sup> The United States have

66. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (Tony Weir trans., 3d ed. 1998).

67. Mathilde Cohen, *Regulating Milk: Women and Cows in France and the United States*, 65 AM. J. COMP. L. 490 (2017).

68. *Id.* at 490–92.

69. *Id.* at 494.

70. *Id.* at 490–92.

taken a more *laissez-faire* approach, leaving human milk exchanges unregulated. By omitting human milk from federal regulations surrounding blood and other bodily tissues, the U.S. government implicitly views human milk as a food product, rather than a bodily part.<sup>71</sup> Cohen noted many similarities in the processing of human milk and animal milk despite the “different regulatory frameworks in place in the United States and in France, milk banking follows in the footsteps of animal milk when it comes to quality assurance.”<sup>72</sup> These examples show how societies can be faced with similar problems—how to regulate human milk exchanges—and find different solutions based on their existing practices, laws, and cultures. So, the same substance can be categorized as a food and as a bodily part by different societies, but these societies come to similar results (processing the milk and safeguards) through the various frameworks employed.

The *praesumptio similitudinis* principle provides some certainty by guiding comparatists employing a functionalist approach to discover similarities between legal systems. A functionalist comparatist might provide an answer to the question, “what is comparison?” by evoking the sameness of function between the different laws and systems under comparison. Functional equivalence is the pegs holding comparisons on the continuous washing line of the *praesumptio similitudinis* principle. Without these pegs, there would be nothing for the comparatist to grasp. If laws are not functionally equivalent, then they are incomparables, and thus cannot be usefully compared.<sup>73</sup> The functionalist approach falls silent when it comes to describing exactly what the nature of incomparables is and what space they inhabit. Instead, it suggests that comparatists, who have found differences between systems, check again to see whether their research question was posed solely in functional terms.<sup>74</sup> The functionalist approach, therefore, can accommodate some difference within the principle of functionality, that is, within its own sphere. Still, we might be left with a sense of dissatisfaction with this explanation of comparison.

---

71. In the 1980s HIV crisis, milk banks in the United States founded their own professional organization, the Human Milk Banking Association of North America (HMBANA); and after the U.S. government failed to regulate milk banks, they created their own voluntary guidelines. *See id.* at 496.

72. *Id.* at 499.

73. Functionalists claim that the basic methodological principle of all comparative law is functionality: *see* ZWEIFERT & KÖTZ, *supra* note 66, at 34. Functionalism was seen as a twentieth-century scientific breakthrough in comparative law, allowing for a greater understanding of context by closely examining the function of legal rules. The narrower law-as-rules approach of the nineteenth-century, saw comparatists all too often find “no law” in foreign legal systems. *See* Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT’L L.J. 221, 228 (1999). *See also* Laura Nader, *Law and the Theory of the Lack*, 28 HASTINGS INT’L & COMP. L. REV. 191 (2005).

74. ZWEIFERT & KÖTZ, *supra* note 66, at 40.

Why is it that, in comparison, function should matter above all else? What makes function the queen of comparison, deciding what is comparable, whereas its very absence should determine the incomparability of objects? Can functionalism accommodate a radical difference outside the sphere of recognized functional sameness? What is function, and how is function related to the thing? These questions seem too obvious to warrant any further consideration. To begin to understand comparison we require a different approach, so taking the wise guidance of the functionalists we will cast our net wider.

### B. *Criss-Crossing and Intertwining Aspectival Games*

We know that all things are said to have aspects, characteristics, or properties, and vice-versa, that these aspects, characteristics, or properties belong to things. Just like hardness might be a property making oak useful in construction, function seems somehow a part of a legal thing enabling comparisons to take place. Saying function is part of a thing and helpful for comparison is almost not worth saying. Still, if aspects belong to things and we are only comparing functionally equivalent things, then there must also be other aspects that also belong to things that are not included in the comparison—Where do they go? What kind of relationship do aspects have with the things? Are the aspects inside the material thing or external to the thing? Even within one thing there are a variety of different properties being concealed and revealed: to point to a piece of paper's shape and then to its color, is to point to an *identical thing* and mean something different.<sup>75</sup> Where is the color? Where is the shape? Without the comparatist, would there be aspects? With these questions in mind, we may have to reform our view to account for the other aspects not shown in the comparison. The *tertium comparationis* binds together the aspects coming into focus in the comparison and the reasons for the comparison. It means the third element in comparison, that is the

---

75. Wittgenstein illustrates this point further:

Point at a piece of paper.—And now point at its shape—now at its colour—now at its number (that sounds odd).—well, how did you do it?—you'll say that you 'meant' something different each time you pointed. And if I ask how that is done, you'll say you concentrated your attention on the colour, the shape, and so on. But now I ask again: how is *that* done? Suppose someone points to a vase and says "Look at the marvellous blue—forget about the shape." Or: "Look at the marvellous shape—the colour doesn't matter." No doubt you'll do something *different* in each case, when you do what he asks you. But do you always do the *same* thing when you direct your attention to the colour?

LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 16e para. 33 (G.E.M. Anscombe et al. trans., Blackwell Publ'g 4th ed. 2009).

“factor which links or is the common ground between two elements in comparison.”<sup>76</sup> There are usually multiple *tertia comparationis*. Where certain aspects of the things under comparison are not the focus of the comparison, these fade into the background and are concealed by the comparison.

Wittgenstein uses the word “game” to show how there are no common features in examples of games, but there are similarities or relationships among all games.<sup>77</sup> Comparison seems to be a game of bringing to light different aspects of the things under comparison. Hence, some games, such as tennis, football, and hockey, share some features, such as a ball; others, like badminton and card games, do not. Tennis and badminton share a racket, whereas card games and football do not. “Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.”<sup>78</sup> You may be thinking that legal things are not like football games, card games, or rugby games, but these games may help bring us a little closer to our question on comparison. Wittgenstein calls *family resemblances* the way in which similarities show themselves by cropping up and disappearing from view, when other aspects are brought to the foreground, as these are like resemblances among family members.<sup>79</sup> Every comparison focuses on a certain aspect of the things under comparison, so the same things can be found to be the same, or different, depending on the aspects coming into focus.

Pointing to the properties and shape of the legal thing is slightly more difficult. Law is language. Wittgenstein likens language to an ancient city that has developed into a maze of different, overlapping, and interacting architectural styles and a network of interconnected streets and alleys: “Language is a labyrinth of paths. You approach from *one* side and know your way about; you approach the same place from another side and no longer know your way about.”<sup>80</sup> Language is

---

76. See *Tertium Comparationis*, in OXFORD ENGLISH DICTIONARY (OED) ONLINE (Dec. 2020), [www.oed.com](http://www.oed.com) (with subscription). *Tertium comparationis* are a direct result of what matters to the comparatist. See Jansen Nils, *Comparative Law and Comparative Knowledge*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 296, 299 (Mathias Reimann & Reinhard Zimmerman eds., 2d ed. 2019). The *tercium comparationis* is the covering value (an aspect highlighted), which usually takes the form of *x* is “better than,” “as valuable as,” or “worse than” *y* with respect to *V* (the covering value). See RUTH CHANG, INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON (1997).

77. JAMES TULLY, STRANGE MULTIPLICITY CONSTITUTIONALISM IN AN AGE OF DIVERSITY 107 (1995).

78. WITTGENSTEIN, *supra* note 75, at 31e–32e para. 66.

79. Wittgenstein’s family resemblances: “67. I can think of no better expression to characterize these similarities than “family resemblances”; for the various resemblances between members of a family: build, features, colour of eyes, gait, and temperament, etc. etc. overlap and criss-cross in the same way.—And I shall say: ‘games’ form a family.” *Id.* at 32e para. 67.

80. *Id.* at 82e para. 203.

far too close to us to be fully articulated in any account of it. We cannot understand because we lack a “*clear view* of the use of our words.”<sup>81</sup> We can see something familiar about comparison walking alongside Wittgenstein’s meandering and cobbled streets.

James Tully shows how the city-like view holds for the language of constitutionalism. The practices and uses of modern constitutionalism share these maze-like features, which have evolved through use, and the various periods are woven into the constitution.<sup>82</sup> Tully’s work demonstrates how the identity and meaning of any culture is *aspectival*, rather than *essential*, because no culture is identical to itself.<sup>83</sup> Both similarities and differences crop up and diffuse, as complex, crisscrossing and intertwined parts, come into view. Tully sets himself the following question: “Can a modern constitution recognise and accommodate cultural diversity?”<sup>84</sup> The question seeks to find the spirit or approach that needs to be taken to properly respond to the demand for recognition, that is, the call for justice. The notion of the politics of cultural recognition was coined by Tully to describe the constitutional problem of cultural diversity. It describes peoples and cultures who have been excluded and are calling for recognition and self-rule on a culturally varied common ground within and between nations.

The politics of cultural recognition unfolds in the intercultural common ground, which is necessary to enable a conversation of mutual recognition, even if it is laden with inequalities and misrecognition.<sup>85</sup> When a demand for constitutional recognition is made, what follows is a squeezing of the demand into the language of contemporary constitutionalism—if it does not fit into the language, then it is not recognized as a demand at all.<sup>86</sup> The language of contemporary constitutionalism is not neutral, it is only “one language among

---

81. Wittgenstein continues: “Our grammar is lacking in this sort of perspicuity. A perspicuous representation produces just that understanding which consists in ‘seeing connexions.’ Hence the importance of finding and inventing intermediate cases.” *Id.* at 49e para. 122.

82. TULLY, *supra* note 77, at 104–05.

83. *Id.* at 11–14.

84. *Id.* at 1. The question arises out of the multitude of groups asking for recognition, such as nationalist movements asking to be legitimately recognised as independent states, the recognition that law has been written by men for much of our history, women and ethnic minorities have been excluded, and this question also encompasses whether supranational associations can recognise cultural differences. *Id.* at 1–11, 14.

85. *Id.* at 14.

86. These new ways of representing the demand are then taken to be the grounds of their claim for recognition and tested in adjudication; so Aboriginal peoples need to speak about a “sovereignty,” or a “right to self-determination”—when these unfamiliar terms may distort how they see these matters in their own languages. *See id.* at 34–39.

others.”<sup>87</sup> To truly hear the demands for recognition, we must learn to hearken and lend an ear to those who see things differently than we do. We must start with the right approach to allow for understanding to take place in a dialogue with others:

To understand a general term, and so know your way around its maze of uses, it is always necessary to enter into a dialogue with interlocutors from other regions of the city, to listen to their “further descriptions” and come to recognise the aspects of the phenomenon in question that they bring to light, aspects which go unnoticed from one’s own familiar set of examples. Since there is always more than one side to a case, one must always consult those on the other side. As a result of exchanges of views by denizens from various neighbourhoods and the findings of examples which mediate their differences, a grasp of the multiplicity of cases is gradually acquired.<sup>88</sup>

Tully engages with the sculpture of *The Spirit of Haida Gwaii* as an opening to think the strange multiplicity that shows a sense of belonging and celebrates diversity.<sup>89</sup> *The Spirit of Haida Gwaii* is an opening to the demands for a constitutional dialogue of recognition. The artwork displays the diverse conversation, the features of cultural diversity that overlap, interact, negotiate, and reimagine. It tells the story of the voyageurs, how their identities have been shaped through overlapping interactions and interdependency, how they overlap and crisscross without losing their identities, and how their identities are contested and questioned through the intercultural, non-Haida travelers also present in the canoe.<sup>90</sup>

---

87. *Id.* at 56–57 (“No matter how comprehensive such a language may appear to be, and some recent candidates in the philosophy of cross-cultural understanding have a very comprehensive appearance, it will always bring to light some aspects of the phenomenon it is employed to comprehend at the expense of disregarding others, as a result of the aspectual character of most social phenomena. It will not be a meta-language of recognition and adjudication but, rather, one language among others.”).

88. *Id.* at 110.

89. Tully sees *The Spirit of Haida Gwaii* sculpture as a symbol of the age of cultural diversity. *Id.* at 17. *The Spirit of Haida Gwaii* was produced by Bill Reid, an artist, with a Haida Gwaii ancestry and it shows “*sghaana* (spirits or myth creatures) from Haida mythology.” *Id.* at 23–24 (“Approaching *The Spirit of Haida Gwaii* in the right spirit does not consist in recognising it as something already familiar to us and in terms drawn from our own traditions and forms of thought. This imperial attitude is to be abjured. Rather, recognition involves acknowledging it in its own terms and traditions, as it wants to be and as it speaks to us. No matter from which direction you approach the canoe, the crew members manifestly seem to say that, after centuries of suppression, they are here to stay, in their own cultural forms and ways.”).

90. *Id.* at 24–25. Tully asks: “Is this not the constitutional game they are playing as they vie and squabble for position, both in the canoe and in Haida mythology?” See also *id.* at 204–205, 22–29 (“This *Xuuya* play is orchestrated by the endless juxtaposition of these diverse and interrelated creatures, the identity of each consisting in the innumerable ways it relates to and interacts with the others. As the assemblage ways it relates to and interacts with the others. As the assemblage is viewed from one point of view, certain aspects are recognised and they give a vision to the whole.”).

Cultural identity is contested and constantly reimagined, depending on which aspects are coming into view. Many comparatists recognize the co-presence of similarities and differences within legal cultures, legal traditions, and mixed families. David Nelken presents legal culture as contested and fragmented, consisting of sedimented historical memories, where any coherence, or unity, claimed by the comparatist is projected onto the culture by outsiders.<sup>91</sup> Nelken's approach acknowledges that one ought to be cautious when using the concept of culture, to avoid making other cultures seem either necessarily similar or other. Similarly, the mixed legal families regard all systems to be mixed hybrids and constantly bleeding into one another and solidifying into new shapes.<sup>92</sup> The legal traditions approach also views tradition as continuously fluid information without borders, but with a stable core.<sup>93</sup> Traditions contain varying and conflicting views, while being in constant contact with one another and tolerating different views.<sup>94</sup> There can be no pure identities or pure traditions, because difference implies isolation, and legal traditions are in constant contact with one another.<sup>95</sup> One constant feature of comparison is that the comparatist must decide what to include and what to exclude.

### C. Indeterminacy and Context

Questions have been asked of functionalism and mainstream comparisons in ever new and creative ways.<sup>96</sup> Pragmatically, functionalism has been found wanting for being too ambiguous to ground the comparison, unable to sufficiently distinguish between the intended

---

91. David Nelken, *Defining and Using the Concept of Legal Culture*, in *COMPARATIVE LAW* 109, 114–20 (Esin Örüçü & David Nelken eds., 2007).

92. Esin Örüçü, *A General View of "Legal Families" and of "Mixing Systems,"* in *COMPARATIVE LAW*, *supra* note 91, at 169, 180.

93. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 13–14 (5th ed. 2014) [hereinafter GLENN, *LEGAL TRADITIONS OF THE WORLD*]; H. Patrick Glenn, *Are Legal Traditions Incommensurable?*, 49 *AM. J. COMP. L.* 133, 140 (2001); H. Patrick Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions*, 50 *MCGILL L.J.* 863, 897 (2005).

94. GLENN, *LEGAL TRADITIONS OF THE WORLD*, *supra* note 93, at 34–35 ("Given any form of contact between traditions, the overall identity of each becomes non-exclusive; each contains elements of the other, which may find support in the various tendencies in the receiving tradition. In today's world there are therefore no pure identities of tradition. The language of contemporary social science recognizes this in objecting to 'essentialist' conceptions of tradition, or even society. Identities thus become 'contrapuntal' or 'aspectival'; the 'inside' and 'outside' are realms which are interdependent rather than discrete.").

95. *Id.* at 35.

96. Comparative lawyers have been described by some in the field (usually by critical comparatists) as falling into two broad camps: (i) the "mainstream," or those who adopt a formalist, legal positivist notion of legal validity and strive for neutrality and objectivity; and (ii) "critical" comparatists. See GÜNTER FRANKENBERG, *COMPARATIVE LAW AS CRITIQUE* 6–7 (2016). See also Simone Glanert & Pierre Legrand, *Law, Comparatism, Epistemic Governance: There Is Critique and Critique*, 18 *GERMAN L.J.* (2017). There are also many comparatists unhappy with the mainstream and for many different reasons. These debates within the field are important, but making the case for each is beyond the scope of this Article.

function of a legal rule and its actual consequences.<sup>97</sup> The legal origins approach responded to the indeterminacy by using regression analysis to provide empirical data about the efficiency of legal rules.<sup>98</sup> This response created other difficulties in the field, and changed comparative law from an exploration of similarities and differences between systems into a ranking of legal systems.<sup>99</sup> The mainstream has long been a brutish tool, unwitting and unreflective about its situatedness within the broader political discourse.<sup>100</sup> Ugo Mattei examined those sponsoring comparative law projects, the types of projects being funded, and the relationship of the work produced to the political agenda of containment, for example, the Ford Foundation funding various projects, including the Cornell project on the “common core of legal systems.”<sup>101</sup> Mainstream comparative law propped up colonialism with its myth of the “lack,” based on an Anglo-European-centric understanding of law. Laura Nader’s work on the “lack” examined the justifications for the Anglo-European colonial and imperial expansion project. The other lacked law, helpfully it was a “lack” which could be corrected by those inventing its (absence as) presence.<sup>102</sup> The “lack” was created and grounded in a particular understanding of “law” and “civilized” people made by comparison. Owing to these roots the field

97. Christopher Whytock, *Legal Origins, Functionalism and the Future of Comparative Law*, *BYU L. REV.* 1879, 1889 (2009).

98. By distinguishing between a legal rule’s *intended* function and its *actual* consequences, we can tell if the legal rule has fulfilled its function: *id.* at 1890. The legal origins approach was developed by the economists Rafael La Porta, Florencio Lopez de Silanes, Andrei Schleifer, and Robert W. Vishny following a study they conducted in 1997 based on investor protection. See Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113 (1998); Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 *J. ECON. LITERATURE* 285 (2008); Edward Glaeser & Andrei Shleifer, *Legal Origins*, 117 *Q. J. ECON.* 1193 (2002). The need for precision regarding what is measured and how it is measured can be traced back to one of the purposes of comparison, which is to find better law. Comparison can be used to borrow or transplant law from one legal system to another. This is rooted in the idea that we all face similar problems, and while we might solve them in different ways, one of these ways might be better than our current system, and we should apply that better solution. See ZWEIGERT & KÖTZ, *supra* note 66, at 1–62. This need for simplicity and certainty has created a new trend using numerical data as the basis for comparisons, and led to a corresponding push-back against it. Ralf Michaels opens a dialogue between the legal origins approach and comparative law: see Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 *AM. J. COMP. L.* 765 (2009).

99. Ugo Mattei, *The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline*, 65 *AM. J. COMP. L.* 567, 605–07 (2017).

100. Note that there has been a debate for many years in comparative law circles about the reduction of the field merely to a method: see Geoffrey Samuel, *Comparative Law and Its Methodology*, in *RESEARCH METHODS IN LAW* 100, 100 (Dawn Watkins & Mandy Burton eds., 2013).

101. Mattei, *supra* note 99, at 567–72, 578–79, 607.

102. Nader showed how the “lack” provided a justification for the colonial appropriations of lands from the Native Americans, for the British Crown the land was vacant: *Terra Nullius*. See Nader, *supra* note 73, at 194. Nader’s argument demonstrates how the “lack” was also applied to other civilizations: including China and Iraq. See *id.* at 197–204.

wrestled with itself, the functionalist presumption of sameness was exposed for its suppression of difference.<sup>103</sup> Many critical comparatists have pushed back against the mainstream, claiming it adopted an unreflective, Anglo-European, positivistic, and rules-based outlook.<sup>104</sup> Mainstream comparisons were grounded in a misplaced, narrow understanding of “progression” that displaced culture and cherished the calculative language of mathematics, economics, and efficiency.<sup>105</sup> Pierre Legrand’s stance against sameness, legal transplants, and the uniformization (standardization) of laws has been persistent and political.<sup>106</sup> It is tied to the cultural approach’s understanding of place as never static, rather, it is a dynamic constituent of legal meaning.<sup>107</sup> Understanding a legal culture is understanding the legal *mentalité*, which is the cognitive structure holding the culture, its underlying assumptions, and attitudes.<sup>108</sup> To the question, “what is comparison?” we may get an answer based on the suppression of difference and a shallow understanding of law, which fails to see the role of place as dynamic, constructing our understanding. But can the cultural approach account for sameness? Or are any claims to sameness in some way a misunderstanding and failing to hold true? Can a like-cases-treated-alike principle ever be applied in the cultural approach, or would the

103. Pierre Legrand, *The Return of the Repressed: Moving Comparative Studies Beyond Pleasure*, 75 TUL. L. REV. 1033, 1048–49 (2000) [hereinafter Legrand, *The Return of the Repressed*] (“I claim that comparatists must resign themselves to the fact that law is a cultural phenomenon and that, therefore, differences across jurisdictions can only ever be overcome imperfectly. Disclaiming any objectivity (and, therefore, bring 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 authenticity.”); Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240, 249, 288 (Pierre Legrand & Roderick Munday eds., 2003).

104. See FRANKENBERG, *supra* note 96; Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65 AM. J. COMP. L. 1 (Supp. 2017).

105. Legrand shows how economics is also embedded in culture and its language is a product of its culture. See Pierre Legrand, *Econocentrism*, 59 U. TORONTO L.J. 215, 216–17 (2009).

106. Legrand also critiques comparative law on the basis that it seeks to “pursue the ideal of impartiality by reducing differences in the lifeworld of the law to calculative and instrumental unity. . . .” Legrand, *The Return of the Repressed*, *supra* note 103, at 1033, 1050.

107. “Place, then, is not a mere static backdrop to legal meaning: it is a dynamic constituent of it.” Legrand, *supra* note 105, at 215, 215.

108. For Legrand, the *mentalités* of the common law and civil law differ: they do not converge, and convergence is undesirable. Legrand distinguishes between English legal *mentalité* and the civil law *mentalité*. Legrand notes differences in the approach to legal reasoning. English legal systems use inductive/analogical reasoning and empirical/metaphorical notions such as “neighbor” and “life-in-being,” whereas civil law, with its Roman legacy, offers an intellectual scheme that classifies the law differently, transcending the raw facts of the case. Civil law reasoning is institutional. The role of custom differs between English legal *mentalité* and civil law *mentalité*; the past is always part of the present in the system of precedent, whereas Roman law was codified so we can always point to specific time. There are also many other ways the *mentalités* differ: the significance of systematization, the character of rules, the role of facts, the present of the past, etc. See Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L COMP. L.Q. 52, 60–78 (1996).

inevitability of sameness happen at the expense of the recognition of difference? What would this mean for consistency?

#### D. *Incommensurability and Truth*

There are questions about the kinds of truth disclosed through comparison that still require attention. These questions come into focus when we consider incommensurability or incomparability. Joseph Raz uses “incommensurability” and “incomparability” interchangeably; however, he distinguishes these from “radical incomparability.” Radical incomparability is where we cannot compare two options in any way; its cause is not a breakdown of comparability, rather it is as a result of indeterminacy.<sup>109</sup> Whereas incommensurability is where we cannot say neither that some options are better nor worse than any other, nor that they are equal.<sup>110</sup> Incommensurability arises where an individual has to choose between two options that are incommensurate and there is no reason for choosing one over the other.<sup>111</sup> Incommensurability is significant because it is not another valuation of the relative merits and demerits of different aspects. The puzzle is that where options are incommensurate reason cannot provide us with an answer, oftentimes, in matters of great importance. Raz puts it poetically: “Incommensurability speaks not of what does escape reason but of what must elude it.”<sup>112</sup> For Raz, only incommensurability holds truth because judgments do not say anything independent of our valuation; ranking aspects only determines a relative value, but it does not get to a deeper truth.<sup>113</sup> Raz argues that a belief in incommensurability is fundamental to having relations with others.<sup>114</sup> Underscoring the importance of a belief in incommensurability as a prerequisite for having friendships, Raz shows how incommensurability is not the failure of comparability. Questions of comparability clearly raise further questions about the implications for practical reason. Can comparison be

109. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 329 (1986).

110. *Id.* at 324. Incommensurability is where “A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.” *Id.* at 322.

111. *Id.* at 334 (“To be precise there are reasons for (and against) each of the incommensurate options, and these may be enough to determine their ranking as against other options. But in the choice between the incommensurate options reasons is unable to provide any guidance.”) (Raz’s footnote 1).

112. *Id.* at 334.

113. *Id.* at 327 (“It is true of course that when we express a judgment about the value of options we strive to identify what is true independently of our valuation. But the ranking which determines the relative value of options is not a way of getting at some deeper truth, it constitutes the value of the options. Values may change, but such a change is not a discovery of a deeper truth. It is simply a change of value. Therefore, where there is incommensurability it is the ultimate truth. There is nothing further behind it, nor is it a sign of imperfection.”).

114. *Id.* at 351. *See also id.* at 352 (“Certain judgments about the non-comparability of certain options and certain attitudes to the exchangeability of options are constitutive of relations with friends, spouses, parents, etc. Only those who hold the view that friendship is neither better nor worse than money, but is simply not comparable to money or other commodities are *capable* of having friends.”).

situated outside the sphere of the comparatist's willfulness or assertions of comparability? Does comparison seek truth as correctness? Does the judgment of sameness based on a comparison hold true in the same way as the fact that "the boiling point of water is 99.98°C" corresponds to reality? What causes incommensurability?<sup>115</sup> What kind of truth does it hold? We will leave this questioning pending for now.

### E. *Slowing the Games of Comparison*

The differing approaches to comparison are like different games, bringing out different family resemblances between the things under comparison. The functionalist comparatist shines a light on function, while at the same time concealing certain other aspects of the systems being compared. The teleological approach highlights and clarifies the *goals* the society pursues.<sup>116</sup> The defense and prosecution both have in mind a goal for their comparisons, whether it is emphasizing an English precedent or reaching out to another jurisdiction to support their argument. A comparatist working on a unifying project is more likely to emphasize sameness; whereas a comparatist who maintains that legal cultures are incommensurable would see no significant similarities between the legal systems under comparison because we are all rooted in place.<sup>117</sup> Wittgenstein's games show us that the

115. If we accept that incommensurability is where reason runs out, where we are stumped, and that a belief in incommensurability is a requirement for being able to form bonds—Where does it come from? Is incommensurability simply a judgment, or something prior?

116. James Gordley, *Comparison, Law and Culture: A Response to Pierre Legrand*, 65 AM. J. COMP. L. 142 (2017). James Gordley uses James Whitman's work on privacy to demonstrate how the teleological approach works: see James Gordley, *Comparison, Law and Culture: A Response to Pierre Legrand*, 65 AM. J. COMP. L. 133, 142 (Supp. 2017) ("The object of Whitman's study of privacy is to clarify the goals that European and American societies are pursuing. If the members of these societies were fully aware of them, they would need no clarification, and Whitman would be pointing out the obvious. By clarifying them, Whitman's study enables members of these societies themselves to understand their goals better. By better understanding their goals, they should be better able to achieve them. Consequently, the teleological approach not only describes these goals but also enables an internal critique of how a society pursues them. One can ask, for example, whether a law or judicial decision actually contributes to achieving these goals."); James Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

117. It is the appreciation of place as forming understanding which leads the cultural approach to argue there is no common ground between legal systems because we cannot overcome estrangement of spatial dislocation. Place is never static, but instead it constructs legal meaning. Place is that out of which law emerges. See Legrand, *supra* note 105, at 215–16. How place constructs our understanding is overlooked by the functionalist mantra, where place is implicitly viewed as inconsequential; hence, functionalists argue they can strip back the law to see it simply as satisfying a particular need. It is for this reason that this cultural approach sees legal transplants as embracing a shallow, formalistic understanding of law, which reduces the legal to rules. See Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997). These views are consistent with understanding meaning as place based; thus one necessarily understands things *differently* than a native lawyer does, and a "meaningful" legal transplant cannot occur, for you cannot translate a law without changing its meaning: *id.*; Gary Watt, *Comparison as Deep Appreciation*, in *METHODS OF COMPARATIVE LAW* 82, 82–83 (Pier-Giuseppe Monateri ed., 2012).

way to understand something is not to look for implicit rules, such as the necessary conditions for an entity to fall under the umbrella of a “game”; instead, we should proceed through practice, and muddle through various instances and examples of games until we come to an understanding.<sup>118</sup>

We can only catch up with the unasked question in comparison if we slow down further and reflect on what has been said. *What is comparison?* It is an aspectival game, whereby certain similarities between things crop up or disappear, depending on which aspects are highlighted in the comparison. *Is that our answer?* Bringing out this aspectival relationship is an important insight revealing something about comparison. But the aspectival game raises more questions about comparison than it answers. For one, what is an aspect? How many honeycombed aspects make up a thing? Are aspects infinitely divisible? Will there forever be another aspect escaping our account?<sup>119</sup> What is the precise nature of the relationship between the thing and its properties? What is a thing? What is the relationship between comparison and the various things comparison has been linked with, be it function, efficiency, or free-flowing information? How is function linked to the legal thing? Where does function reside, inside the thing or outside it? How, when, and why did function or efficiency become linked to comparison? Comparison involves: (i) a drawing out of certain properties of the things under comparison; (ii) a joining of these properties back onto each of the things; and (iii) a judgment of some kind linking properties and things to each other. Thus, comparison cannot be wholly dependent on the perceived things. The comparatist is drawing out aspects and making a judgment—a judgment grounded in correctness, and somehow in agreement with the perceived. Precisely how the aspects are linked to the perceived, or what truth they hold, remains unclear. Are aspects there in the thingliness of the thing? Or do the aspects make up the perceivedness of the perceived (thing)? How does the perceivedness of the thing belong to the thing? Or does the perceivedness belong to the comparatist? If we pull at this aspectival thread a little more, we may find further food for thought.

---

118. Summarizing Tully on Wittgenstein. See TULLY, *supra* note 77, at 108. We understand something not by learning how a word operates in theory, but through the practical activity of using the word in different circumstances. See also *id.* at 106. I will be expanding on this point in Part III.A (“Seeing as, Aspect Dawning, and Aspect Blindness”).

119. Marilyn Strathern calls this problem the perception of increasable complication: there are always more things for the comparatist to know. Any account produced will only ever be incomplete. We can only ever *partially* describe individuals/classes/relationships. See MARILYN STRATHERN, *PARTIAL CONNECTIONS*, at xiv (updated ed. 2004).

### III. ASKING THE QUESTION OF COMPARISON AFRESH

#### A. *Seeing as, Aspect Dawning, and Aspect Blindness*

Wittgenstein's notions of *seeing as* and aspect blindness may further facilitate our investigation into comparison. Wittgenstein named two kinds of seeing: (a) to see a drawing, the cat, or an entity in the world, (b) *seeing as*, meaning to see a likeness, or notice similarities or differences between things—noticing aspects.<sup>120</sup> Wittgenstein used Jastrow's duck/rabbit picture to illustrate continuous aspect perception (*seeing as*) and aspect dawning.<sup>121</sup> Stephen Mulhall exposed the fundamental role *seeing as* plays as an *attitude* of taking for granted, it is a certain kind of knowing one's way around, or in this case, the picture world. Mulhall showed how *seeing as* is essential to understanding an entity as a particular *kind* of object understanding and its relationship to a whole world.<sup>122</sup> Thinking back to Cézanne's paintings of his beloved Montagne Sainte-Victoire: a compatriot may examine these paintings and feel at home in the landscape; another viewer may notice the presence of the mountain in Cézanne's works; an art critic may recognize Cézanne's hand and perhaps situate his works as post-impressionist. In each of these examples, *seeing as* is at work, and in each case, there is an understanding of how to relate to the painting, the *kind* of object that is being examined, and a knowing of one's way around the world of painting. To put it another way, *seeing as* is the moment before the Heideggerian hammer breaks, where it is ready-to-hand and fades into its usefulness. The distinction between *seeing as* and interpretation is also important. There is an immediacy, a ready-to-handedness to *seeing as*.<sup>123</sup> Whereas interpreting something is distancing, an afterwards; interpretation is required when understanding breaks down.<sup>124</sup> For the most part, we take our understanding of everyday things for granted; we already know how to use

120. See WITGENSTEIN, *supra* note 75, at 193e para. xi (“Two uses of the word ‘see.’ The one: ‘What do you see there?’—‘I see this’ (and then a description, a drawing, a copy). The other: ‘I see a likeness between these two faces’—let the man I tell this to be seeing the faces as clearly as I do myself. The importance of this is the difference of category between the two ‘objects’ of sight. The one man might make an accurate drawing of the two faces, and the other notice in the drawing the likeness which the former did not see. I contemplate a face, and then suddenly notice its likeness to another. I see that it has not changed; and yet I see it differently. I call this experience ‘noticing an aspects.’”).

121. *Id.* at 194e para. xi.

122. STEPHEN MULHALL, ON BEING IN THE WORLD: WITGENSTEIN AND HEIDEGGER ON SEEING ASPECTS 24–25, 51, 142 (2014).

123. *Id.* at 22.

124. Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685, 691 (2005).

them, like a signpost would be ambiguous without the continuous practice of following it.<sup>125</sup>

Aspect dawning refers to that peculiar instant, whereby one is struck that the picture-rabbit is changing into a picture-duck. Nothing has changed, and yet it has changed, but nothing has changed. One can experience aspect dawning if one relates to the picture of continuous aspect perception.<sup>126</sup> To put it another way, aspect dawning reveals the attitude of continuous aspect perception. Aspect dawning also begins to reveal how we have underestimated the role comparison plays in our daily life. Whenever there is a moment of aspect dawning, we see comparison most obviously at work. The moment of seeing differently, now in one way and now in another, is bound up with us somehow and hidden from us. Understanding is not visible to us and observing certain traits in things does not make it so.<sup>127</sup> For the most part, we are nescient of our daily comparisons. It is only where one way of seeing gives way to another that our eyes are opened to comparison. Wittgenstein's continuous aspect perception shows us another way comparison is quietly present in our everyday life, and it raises important questions about our relationship to comparison.

If one gazed intensely at the famous duck-rabbit and only ever saw a picture-rabbit, then one would have misunderstood the object being observed, while remaining unaware of one's own predicament. Not only would one be missing out on the joyful picture-duck experience, one would not be able to see that something was conditioning one's seeing.<sup>128</sup> Aspect blindness refers to this inability to experience aspect dawning. Wittgenstein's examples show how aspect blindness might manifest itself as seeing a painting as a blueprint, or as specks of blue, yellow, and red paint; or seeing a human being's behavior as individual processes of a machine, thus failing to relate to them fully as another quirky human.<sup>129</sup> Mulhall clarifies aspect blindness, showing that is not on the same level as the aspects lacking; it is not

---

125. See Wittgenstein in G.P. BAKER & P.M.S. HACKER, *WITTGENSTEIN RULES, GRAMMAR AND NECESSITY* 136, § 2 (2000) ("It is not the interpretation which builds the bridge between the sign and what is signified//meant//. Only the practice does that."). A signpost could be ambiguous without the practice (convention) of following it, we might not know whether to climb sign-posts, or follow the opposite direction to the pointed bit of the wood, our practice of using sign-posts guides us: see WITTGENSTEIN, *supra* note 75, at 39e para. 85. See also Tully and Patterson's explanations of understanding and interpretation in Wittgenstein: James Tully, *Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection*, 17 *POL. THEORY* 172, 194 (1989); Dennis Patterson, *Wittgenstein on Understanding and Interpretation (Comments on the Work of Thomas Morawetz)*, 29 *PHIL. INVESTIGATIONS* 134 (2006).

126. MULHALL, *supra* note 122, at 30.

127. "For even supposing I had found something that happened in all those cases of understanding, why should *it* be the understanding?" WITTGENSTEIN, *supra* note 75, at 60e para. 153.

128. Oren Ben-Dor, *The Gravity of Steering, the Grace of Gliding and Primordially of Presencing Place: Reflections on Truthfulness, Worlding, Seeing, Saying and Showing in Practical Reasoning and Law*, 26 *INT'L J. SEMIOTICS L.* 341, 363 (2012).

129. MULHALL, *supra* note 122, at 73, 85–86.

an inability to draw correct conclusions, but rather the lack is found in the need to draw conclusions at all.<sup>130</sup> Wittgenstein makes an important categorial distinction between aspects and properties: an *aspect* records the kind of object something is, whereas *shape* or *color* refers to the material properties of the object.<sup>131</sup> The aspect blind infer through the interpretation of properties, rather than a ready-to-hand understanding of the painting, or a friendly face. This aspect-blind way of relating through an interpretation of properties could help us further in our investigation of mainstream comparison. At the heart of this matter is our earlier questioning, it is not clear what kind of relationship mainstream comparison has with all the things related to it, such as functional equivalence, legal culture, information—Are these what Wittgenstein called aspects or properties? What is an aspect?

### B. *Steering Togetherness*

The problem of aspects and the classification of legal systems is the question of legal space; it is the placing of legal thought, that is, where legal thought takes place.<sup>132</sup> The mainstream is full of boxes. There is a box for every thing: legal traditions, legal cultures, legal families, and even mixed legal families.<sup>133</sup> Stramignoni diagnoses the problem of “boxing” as a kind of thinking that creates “boxes” (categories and concepts, territories, or *corpora*) which it treats as real and structurally true, all the while ignoring the uniqueness of the being they *actually* are.<sup>134</sup> Boxing is an instance of a kind of thinking

130. *Id.* at 87.

131. *Id.* at 28–29.

132. Igor Stramignoni, *Categories and Concepts: Mapping Maps in Western Legal Thought*, 1 INT'L J.L. CONTEXT 411, 419–423 (2005).

133. There is an extensive literature dedicated to the indeterminacy of the concepts and components of comparison. It interrogates various vague concepts, such as culture, to justify its usefulness in comparison. At times, culture includes both ideas and behavior; whereas the concept of tradition is seen as a clearer one, because it focuses only on information (ideas). See William Twining et al., *A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World, 2nd Edition*, 1 J. COMP. L. 100, 109–10 (2006). Legal traditions are sometimes seen as the dominant paradigm: see Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 677 (2002). Legal traditions have a *point of origination*; then there is a *capture* (in memory or writing), followed by subsequent access and application; and lastly there is a *recapture* of information: see H. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEEN'S L.J. 427, 435 (2008). However, the idea that traditions can be *captured* is problematic. To *capture* traditions requires a cessation, which changes the nature of fluid, continually changing traditions. The mixed legal families also found a similar solution to this problem of indeterminacy; namely, by fixing the molten legal systems that cool down and solidify into new shapes: see Örucü, *supra* note 92, at 180. The solidification of the objects of comparison allows for the comparison to take place by allowing for a certain object to be grasped by the comparison. The talk of indeterminacy and ambiguity in comparison are symptoms of “boxing.” Boxing arises from the traditional subject-object thinking, and is itself caused by a certain comportment toward “things.”

134. Stramignoni, *supra* note 132, at 419–20.

concerned with measuring out, a kind of instrumental and calculating thinking, which is prevalent in the mainstream and in the Western legal tradition.<sup>135</sup> Calculating thinking dominates the meaning that is there, by deciding the approach *in advance*.<sup>136</sup> There is a tension within the mainstream literature on comparison. The reflexive turn has brought new insights, such as the understanding that we cannot represent another culture, but only provide a connection with it. We now see that cultural identity is fleeting—evasive—in movement; and yet, there is still the drive to model nature in some way as being composed of a multiplicity of entities.<sup>137</sup> There is still a repetition of the same kind of thought driving comparison. The mainstream literature does not recognize the dominance of a kind of thinking that places the comparatist at the center because this kind of thought is so pervasive.

Mainstream comparison is still located within the subject–object framework, whereby it is the comparatist’s representations of beings that count, and we slide from one comparatist’s representations to another in each comparison game. The comparatist steers comparability and (un)makes the meanings of things and places through the comparison.<sup>138</sup> Mainstream comparison, its basic concepts and structures, require a human-centered steering by the comparatist. The kind of togetherness within mainstream comparison is the togetherness sought by the comparatist. The comparatist makes the belonging *together* through togetherness. It is the kind of belonging that thinks the togetherness first, as a knotting together by the subject.<sup>139</sup> When we consider ourselves as human subjects “I” spying objects, we are making what Heidegger calls ontical inquiries. Ontic refers to a language of descriptions and representations—beingness, rather than Being.<sup>140</sup> Ontical inquiries are those examining entities and the facts about them, ontical is contrasted with ontological inquiry concerning Being.<sup>141</sup> Mainstream comparison demarcates ontical inquiries, interpreting extants as an instance of functional equivalence, or an instance of information—the approach sets the inquiry. Mainstream

---

135. Igor Stramignoni, *Meditating Comparisons, or the Question of Comparative Law*, 4 SAN DIEGO INT’L L.J. 57, 57–65 (2003).

136. *Id.* at 63.

137. STRATHERN, *supra* note 119, at 7–15.

138. See, for a description of *steering*, Ben-Dor, *supra* note 128, at 352, 366.

139. MARTIN HEIDEGGER, BREMEN AND FREIBURG LECTURES 112 (Andrew Mitchell trans., Indiana Univ. Press 2012).

140. Ben-Dor, *supra* note 128, at 348 (To this subject-object relationship with beings, Heidegger called ontic, namely epistemological, theoretical, normative, logical, and derivative ontological reflections that involve representations of the “beingness of beings and their relations, crucially for our purposes, representations by and of relations between human-beings. This he contrasted with the fundamental ontological question of Being itself (hence the capitalisation), which is the withdrawing movement of presencing that persists alongside the beingness of beings (“ontology”), in complementarity to it, but at the same time other and nearer than it.”).

141. MARTIN HEIDEGGER, BEING AND TIME 3 (J. Macquarrie & E. Robinson trans., Blackwell Publ’g 2011).

comparison does not think the ontological difference. Heidegger calls the difference between a being and Being—the ontological difference.<sup>142</sup> The distinction between Being and a being is not simply an empty repetition. Being is always the Being of a being—it always has an ontical foundation.<sup>143</sup> While Being is nearest to us, the ontic is the most accessible to us. We need the ontic “because” Being withdraws. Heidegger never stopped trying to ask the question of the meaning of Being. The question leads back to us, as those able to ask the question of the meaning of Being.

We are distinguishable from other beings because we live in the understanding of Being, and Being is an issue for us; we grow up and into a way of understanding ourselves.<sup>144</sup> We are Dasein (Being-there), but Dasein is not simply a replacement for the word “human.”<sup>145</sup> The Being of Dasein is Being-in-the-world. Being-in-the-world is not a property Dasein has; rather, Dasein projects a world for itself—it *ek-sists* always already having stepped beyond itself.<sup>146</sup> Being-in-the-world shows how Dasein is not a self-contained subject encountering objects, because Dasein has always-already stepped out beyond itself. The usual subject–object relation tells us that we are *directing ourselves toward* what is perceived, and that the perceived is always understood as perceived in its perceivedness. The *directing ourselves toward* is usually considered as part of the subject, whereas Heidegger shows that this separation between the subject and object misunderstands how we are always already dwelling with extants.<sup>147</sup> Dasein is always already being-with intraworldly beings and understanding beings in their Being. As Heidegger puts it, “[f]or the Dasein there is no outside, for which reason it is also absurd to talk about an inside.”<sup>148</sup> Heidegger shows how the perceivedness (uncoveredness) of the perceived is not within the extant, nor in a subject; it is part of Dasein’s intentional comportment toward extants, allowing us to apprehend beings in their Being. But a being can only be uncovered if the Being of a being is already disclosed to us—I must already understand it.<sup>149</sup> Dasein’s intentional comportment toward extants is grounded in Dasein’s Being-in-the-world.<sup>150</sup>

---

142. MARTIN HEIDEGGER, *THE BASIC PROBLEMS OF PHENOMENOLOGY* 319 (Albert Hofstadter trans., Indiana Univ. Press 1988).

143. *Id.* at 19.

144. HEIDEGGER, *supra* note 141, at 32–33 (“Dasein always understands itself in terms of its existence—in terms of a possibility of itself: to be itself or not itself. Dasein has either chosen these possibilities itself, or got itself into them, or grown up in them already.”).

145. *Id.* at 67–71.

146. HEIDEGGER, *supra* note 142, at 170.

147. *Id.* at 64.

148. *Id.* at 66.

149. *Id.* at 70–72.

150. *Id.* at 161–75.

The usual starting point of our investigations, whereby the comparatist selects from among the basic concepts of comparison and steers meaning, is an aspect-blind way of relating, or to put it in Heidegger's language, present-at-hand. For the most part, in our daily lives, we use things in a ready-to-hand manner of proximity, without the need to measure where the coffee sits in relation to the keyboard. The keyboard does not usually draw our attention, becoming an extension of ourselves, until it stops working. The ready-to-hand is that which is nearest to us. The closeness in using equipment regulates itself circumspectively through using.<sup>151</sup> *Circumspection* is the translation of "*Umsicht*," meaning a special kind of sight "*um*," also meant in the sense of *around* or *in order to*.<sup>152</sup> When the keyboard breaks or a key jams, then it becomes present-at-hand. There is much more to say about the question of Being and Heidegger's early project, but what has been said should be sufficient to ground the question of whether there can be another kind of primordial comparison.

### C. Poetic Comparisons

Stramignoni asks whether we can think afresh, What *is* comparative law? This question is an attempt to overcome the language of description and representation in mainstream comparison. It is an important breakthrough that recognizes the terms of the debate, while attempting to move beyond it, into another kind of thinking. By asking, what *is* comparative law? Stramignoni raises the possibility of another way of comparing through meditating comparisons. Stramignoni embraces much of Heidegger's thinking, bringing new insights to the literature. Heidegger's later works reveal the difference between the calculative thinking, which we have encountered in mainstream comparison, and meditating thinking—original thinking.<sup>153</sup> Meditating thinking is the thinking of Being through thinking language as *in-between*. Through it, we come to the thought that language is the house of Being.<sup>154</sup> Unlike mainstream comparisons, meditating comparisons do not seek out sameness of function, efficiency, or linear history, but neither are they poetry, or any kind of representational thought of ordinary language.<sup>155</sup>

Meditating comparison is a kind of poetic thought. Poetry is a kind of dwelling, beyond metaphysical thought.<sup>156</sup> For Stramignoni, a way to think the ontological difference in comparative law is through

151. HEIDEGGER, *supra* note 141, at 134–37; David Cerbone, *Heidegger on Space and Spatiality*, in *THE CAMBRIDGE COMPANION TO HEIDEGGER'S BEING AND TIME* 129, 132–33 (Mark Wrathall ed., 2013).

152. HEIDEGGER, *supra* note 141, at 98–99.

153. Stramignoni, *supra* note 135, at 76; Stramignoni, *supra* note 15, at 753.

154. Stramignoni, *supra* note 135, at 72.

155. *Id.* at 63.

156. Stramignoni, *supra* note 15, at 763.

poetic comparisons. The comparatist accesses meditating thinking through belonging to language. It is language that speaks through the law and not man.<sup>157</sup> Law, like language, shares in-betweenness; law is both calculating thinking and other-thinking (meditating thinking). So poetic comparisons are able to show both law *as* law and the possibility of *other law*.<sup>158</sup>

Language is itself a threshold, it is an “in-between”: it is both in thinking and between thinking law *as* law and *other thinking*.<sup>159</sup> Language is never fully present, but comes from a sheltered absence: “[T]he calling of language calls into a presence which can only be within an absence.”<sup>160</sup> The comparatist poet is able to be aware of this co-presence: the present presence and present absence.<sup>161</sup> The comparatist poets are keepers of this difference. Co-presence is also pointing to how *cum-parare* means to lay out together; that which is “laid out together comes to appear at the same time, it appears together, it co-appears . . .”<sup>162</sup> However, difference is not the traditional way we might understand difference. It is dif-ference, which sustains the world and beings in their Being, keeping them in their unity, to be what they turn out to be; dif-ference here is *phusis*, the emergence.<sup>163</sup>

Comparatist poets are guardians of the law: to be aware of a belonging together of a presence, where they are vigilant of the law’s presence and are aware of the absence.<sup>164</sup> To guard means to watch with care, that is, to regard something or somebody meticulously on their own terms.<sup>165</sup> It is through this vigilance and guarding that they are looking at something thoroughly, in their own terms—in their own radical belonging together.<sup>166</sup> The comparatist poet is able to be a comparatist poet insofar as she is vigilant in the co-presence and a guardian of language.<sup>167</sup> The comparatist poet can be closer to language than most, because they are distant from home, and they dwell in the distance.<sup>168</sup> In dwelling *in* the distance, the comparatist poet can tell, *What difference does the law make?*<sup>169</sup>

---

157. Stramignoni, *supra* note 135, at 79.

158. *Id.* at 71.

159. *Id.* at 68.

160. *Id.* at 69.

161. *Id.* at 79.

162. Stramignoni, *supra* note 15, at 769.

163. *Id.* at 770. Heidegger called a dif-ference when language speaks the inexpressible, it is the delay between call and response, bringing thingness and the world together and apart in the in-betweenness. See OREN BEN-DOR, THINKING ABOUT LAW IN SILENCE WITH HEIDEGGER 68 (2007).

164. The notion of belonging together is in the sense of *belonging* together, thinking our *belonging* together with Being. See Stramignoni, *supra* note 135, at 74–78; HEIDEGGER, *supra* note 139, at 112.

165. Stramignoni, *supra* note 135, at 78.

166. *Id.* at 78.

167. *Id.* at 79.

168. *Id.* at 80.

169. *Id.* at 80.

In many ways, Stramignoni recognizes the current terms of the debate and is pointing us further away from the legal tradition of calculating thought. Poetic comparisons are not legal comparisons. They are an attempt to reinvent Western legal thinking apart from its current form, solely in calculative thought.<sup>170</sup> Poetic comparisons are intimations of a thinking that is still to come. They are a *clearing*, lying in-between. Our belonging to language means that we are able to access both thinking law *as* law and *other thinking*, and that law (as language) contains the possibility of both.<sup>171</sup> The way forward for the poetic comparatist is to continuously raise and ask again the question “what *is* comparative law?”<sup>172</sup> This question about comparative law is asking about the ground for comparative law. It is a *how* rather than merely a *what*: “[H]ow can comparative law be thought afresh?”<sup>173</sup> In asking *how*, it turns comparative law back onto itself, challenging it to think (again). This Article wishes to build on this work, and not only ask whether we can think comparative law afresh, but also whether we can think comparison afresh.

#### D. *Not Yet Asking the Question of Comparison*

The questioning of comparative law raises more originary questions about comparison itself. This Article is merely a starting point to show the reader that we are in comparison but not yet asking the question of comparison. Not yet asking the question of comparison does not mean that no one has ever thought about or questioned comparison. This Article has immersed itself in the labyrinth of ways in which different writers have thought comparison; and yet, while we are entangled in the questions of sameness and difference, of finding the function and tying together, we are still not asking the question of comparison. We are still not asking the question of comparison because comparison is seen as self-evident and unproblematic; but it does not follow that comparison is not worthy of questioning. This Article is shining a light on our ontic comparisons and asks about our relationship to comparison.

We cannot yet ask the question of comparison. Asking the question of comparison would require another approach—a leap from our current thinking. Turning back to language may be a way of approaching our originary question of comparison. To think comparison etymologically is not to stumble into a decaying ruin and ponder what it once was; it is a way of letting language speak. We are bound to follow this way of thinking that comes towards us. The current literature is largely based on the Latin *comparāre*, meaning *co-presence*; but

---

170. *Id.* at 76.

171. *Id.* at 71.

172. *Id.* at 78.

173. *Id.* at 89.

the word *comparison* has its origins in the Greek *parable*. The *Greek-English Lexicon* defines the meaning of *parable*, παραβολή, as a comparison, illustration, analogy, and a proverb.<sup>174</sup> Parable is composed of “*para-*” (παρα), meaning “side-by-side” and “-*bole*” (βολή), meaning “thrown.”<sup>175</sup> The side-by-side of parable lives on, albeit distortedly, in the co-presence of comparison.

The relationship between *parable* and *comparison* has been consistently confirmed by many sources.<sup>176</sup> Parable has deep roots. In the Bible, it referred to the word of the Lord.<sup>177</sup> Jesus also spoke in parables. When Jesus was asked by one of his disciples why he was speaking to the crowd in parables, he replied that parables were a means of access to the mysteries of heaven.<sup>178</sup> Perhaps these revelations have lost the force they once had, but they still invite us to think of the kind of truth that is disclosed by a parable. Speaking in parables may be a way of bringing into the open a truth that cannot be accessed in any other way.<sup>179</sup> In the Greek world, parables were a way of bearing a message. The relationship between hermeneutics and parables is usually said to be about the “interpretation” of biblical texts; and yet, concealed within such a view is also a persisting primordial relation: Hermes was the god bearing messages and responding to the call.<sup>180</sup> Each source sheds some light, and paradoxically adds to the intricacy. Hermes’ message may also be carried in poetry, and to some extent in analogies which all appear interrelated. These are merely initial thoughts that need to be investigated thoroughly. The initial exploration into the origin of comparison has laid bare the perseverance of *parable*, a placing side-by-side carried through the Latin *compare* as a bringing together; at the same time, there was once a place claimed through parable—now lost. Comparison discloses much more than presently thought.

174. 2(1) HENRY STUART JONES & RODERICK MCKENZIE, A GREEK-ENGLISH LEXICON COMPILED BY GEORGE LIDDEL AND ROBERT SCOTT 1305, § II (1925–1930). The ancient Greek etymology of παραβολή (*parable*), meaning “a placing side by side, comparison analogy”; it also means a “proverb.” See *Parable, n.*, in OXFORD ENGLISH DICTIONARY (OED) ONLINE, *supra* note 76.

175. The prefix “*para-*” (παρα-) means “by the side of,” “alongside of, by, past, beyond”; “*para-*” *Bole* is + βολή is casting, putting, a throw. See *Metabole, n.*, in OXFORD ENGLISH DICTIONARY (OED) ONLINE, *supra* note 76.

176. One of the most authoritative and oldest English dictionaries describes “*parable*” as “a similitude; a ratiō under which something else is figured.” See ALEXANDRE CHALMES, SAMUEL JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE 521 (1994).

177. *Numbers* 23:5–9; 23:7 (King James).

178. *Matthew* 13:10–16 (King James). See also *id.* at 13:34–35 (“All these things spake Jesus unto the multitude in parables; and without a parable spake he not unto them: That it might be fulfilled which was spoken by the prophet, saying, I will open my mouth in parables; I will utter things which have been kept secret from the foundation of the world.”).

179. “Therefore speak I to them in parables: because they seeing see not; and hearing they hear not, neither do they understand.” *Id.* at 13:10–16.

180. MARTIN HEIDEGGER, ON THE WAY TO LANGUAGE 29 (Peter Hertz trans., HarperCollins 1982); Oren Ben-Dor, *Agonic Is Not Yet Demonic?*, in LAW AND ART: JUSTICE, ETHICS AND AESTHETICS 6, 117 (Oren Ben-Dor ed., 2011).