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On Hostility and Hospitality: Othering Pierre Legrand

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Pierre Legrand's return to the pages of the American Journal of Comparative Law *after nearly twenty years is cause for reflection on the reasons for this prolific comparatist's absence from one of the discipline's leading scholarly fora. One reason is the widespread disdain aimed at Legrand as a result of his persistent, sharply critical, and often pointedly personal crusade against the discipline's accepted approaches and their most prominent practitioners. This is partly the nature of the article he publishes in this collection, which features a no-holds-bared, uncomplimentary assessment of the work of James Gordley. In this Article I argue that Legrand's exile is a poor response to his sharp-tongued but profoundly important vision for our discipline. The better path, one I try to map here, would be to challenge Legrand by exposing the ways in which his hostility for comparative law's "established scholars" clashes with the Derridian critical theory that animates all of his work.*

> "It is because our responsibility to the Other is definitive of the self, rather than threatening to it, that the boundary between self and Other becomes significant as the threshold of an unconditional hospitality rather than an ever-present possibility of war . . . ."[1]

INTRODUCTION

Pierre Legrand has returned to the pages of the *American Journal of Comparative Law*.[2] This begs an uncomfortable question.

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1. Gideon Baker, *Cosmopolitanism as Hospitality: Revisiting Identity and Differences in Cosmopolitanism*, 34 ALTERNATIVES 107, 117 (2009).

2. *See* Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65 AM. J. COMP. L. (SPECIAL ISSUE) 1 (2017).

Why have almost twenty years passed—his remarkable dialogue with Professor Merryman appeared in 1999[3]—since Legrand last published in our discipline's flagship journal?[4]

It is not for a lack of productivity or prominence.[5]

There are surely a number of reasons for this *inhabilis oblivio*, many attributable to Legrand himself. In the last decade, for example, he has been involved in the launch of an alternative forum for scholarship in comparative legal studies. In that time, Legrand has contributed more than a dozen reviews, essays, and articles to the *Journal of Comparative Law*,[6] most recently a sweeping reflection on and reevaluation of his (dis)position in our field.[7] Some of this work has canonical status and the *American Journal of Comparative Law* would have been fortunate to publish it. I do not know if Legrand submitted any of these (or other) texts to the *American Journal of Comparative Law*, only to have them refused.[8] Legrand's exile also surely has something to do with his harshly critical engagement with the work of many of the discipline's leading figures and prevailing approaches.[9] The fallout from these relentless, tetchy encounters is evident in the circumstances surrounding the publication of his article *Jameses at Play: A Tractation on the Comparison of Laws* in this issue of the *American Journal of Comparative Law*.[10] It has

3. *See* Pierre Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 AM. J. COMP. L. 3 (1999).

4. Legrand bestows this status on the *Journal*. *See* Legrand, *supra* note 2, at 11.

5. Legrand features prominently in many surveys of the discipline. *See* MATHIAS SIEMS, COMPARATIVE LAW 109–14 (2014). Siems concludes that "Pierre Legrand's research deserves special attention. Legrand is one of the most prolific – but also one of the most controversial – contemporary comparatists." *Id.* at 110.

6. *See generally* Pierre Legrand, *A Review of Teemu Ruskola's Legal Orientalism*, 8 J. COMP. L. 444 (2014); Pierre Legrand, *Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris*, 8 J. COMP. L. 343 (2013); Pierre Legrand, *Book Review of Feminist Constitutionalism (Beverley Baines et al. eds.)*, 8 J. COMP. L. 318 (2013); Pierre Legrand, *Book Review of The Derivative Action in Asia (Dan W. Puchniak et al. eds.)*, 7 J. COMP. L. 347 (2012); Pierre Legrand, *Book Review of Madhavi Sunder's From Goods to a Good Life*, 7 J. COMP. L. 248 (2012); Pierre Legrand, *Foreign Law: Understanding Understanding*, 6 J. COMP. L. 67 (2011); Pierre Legrand, *Book Review of Vicki C. Jackson's Constitutional Engagement in a Transnational Era*, 5 J. COMP. L. 387 (2011); Pierre Legrand, *Book Review of Bruno Latour's The Making of Law*, 5 J. COMP. L. 280 (2011); Pierre Legrand, *Book Review of Richard Hyland's Gifts*, 4 J. COMP. L. 309 (2010); Pierre Legrand, *Book Review of The Oxford Handbook of Comparative Law (Matthias Reimann & Reinhard Zimmermann eds.)*, 2 J. COMP. L. 253 (2007); Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity*, 1 J. COMP. L. 365 (2006); Pierre Legrand, *Antivonbar*, 1 J. COMP. L. 13 (2006) [hereinafter Legrand, *Antivonbar*].

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

8. The disdain Legrand harbors for the "orthodoxy" in the discipline suggests that he has not been warmly welcomed by its mainstream institutions. In particular, he aims his vituperation at the "gatekeepers" who edit the discipline's "principal journals." *See* Legrand, *supra* note 2, at 10. *See also* Legrand, *supra* note 7, at 407 ("To counter positivism . . . would be perilous, so fraught with danger in fact that the critical comparatist might at any moment be confined to one kind of silence or another by any of the field's 'gate-keepers' (a silence that might in turn prompt the deepest part of him also to fall silent).").

9. *See* SIEMS, *supra* note 5, at 110 ("A significant proportion of [Legrand's] research is openly confrontational.").

10. Legrand, *supra* note 2.

been a protracted effort burdened by controversy, necessitating the publication of responses, a solicited critique, and ultimately a phalanx of contributions from other comparatists whose participation in the collection is meant to mitigate the risk of publishing an article—just markings on a page—authored by Pierre Legrand. My Article is part of this ungainly, Potemkin arrangement, which might substantiate Legrand's worst suspicions about the discipline's thrall to orthodoxy and punishing exclusivity.[11] At the very least it confirms that Legrand has some well-placed and determined detractors in this business.

All of this poses some beautiful ironies: a disciplinary melodrama stirred by a text produced by the comparatist least likely to acknowledge the possibility of a discipline, to believe in the text's existence, or to credit the significance of his authorship of it. That framing of this publication event merits our attention, too. But I have a more modest ambition. I want to consider the reason for all the trouble: why does Pierre Legrand engender so much hostility? And then I would like to offer a gentle rebuke of the discipline's reaction to Legrand by suggesting a more critically-informed response to his work. I come here not to bury Pierre Legrand, but to praise him—by offering his work the dignity of taking seriously the theoretical claims at the heart of his project. More than his exclusion (or, now, his inclusion and encirclement), we would do better to interrogate the degree to which Pierre Legrand lives up to his declared theoretical ambitions.

I. On Hostility

Pierre Legrand has been on the attack for a long time. Even in his earliest comparative law contributions one feels him straining at the bit of the discipline's settled ways.[12] In interviews, book reviews, and articles he has challenged what he regards as the impoverished jurisprudence of positivism and logocentrism that informs some of comparative law's most widely accepted endeavors, including

11. *See id.* at 10–11.

12. *See generally* Pierre Legrand, *What "Legal Transplants"*, *in* Adapting Legal Cultures 55 (David Nelkin & Johannes Fees eds., 2001); Pierre Legrand, *Are Civilians Educable*, 18 Legal Stud. 216 (1998); Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 Maastricht J. Eur. & Comp. L. 111 (1997) [hereinafter Legrand, *The Impossibility of "Legal Transplants"*]; Pierre Legrand, *Against a European Civil Code*, 60 Mod. L. Rev. 44 (1997); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 Int'l & Comp. L.Q. 52 (1996) [hereinafter Legrand, *European Legal Systems Are Not Converging*]; Pierre Legrand, *Bureaucrats at Play: The New Quebec Civil Code*, 10 Brit. J. Canadian Stud. 52 (1995); Pierre Legrand, *A Diabolical Idea*, *in* Towards a European Civil Code 245 (A.S. Hartkamp *et al.* eds., 3rd ed. 2004) (1995); Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 Mod. L. Rev. 262 (1995); Pierre Legrand, *Civil-Law Codification in Quebec: A Case of Decivilianization*, 1 Zeitschrift für Europäisches Privatrecht 574 (1993).

functionalism,[13] common core projects,[14] legal transplants,[15] and the European legal harmonization agenda.[16]

Often this has taken a sharply *ad homonym* turn. This habit is epitomized by his article *Antivonbar*, which was the first full-length work to appear in the new *Journal of Comparative Law*.[17] The article is a bellicose rejection of the legal positivism that informs Christian von Bar's work—in the context of European harmonization—to develop a new civil code for all of Europe.[18] That perspective surely would have made Legrand few friends, especially among sectarian Europeanists.[19] But his rough treatment of von Bar (and others in the context of other projects) have made enemies among the discipline's "established academics."[20] For those who find him objectionable (or worse), Legrand has crossed the line of scholarly civility with his characterization of von Bar as almost touchingly naïve.[21] Legrand explains that his eight-year-old daughter also does not feel the need to pursue an ontological or critical examination of the world.[22] Legrand accuses von Bar of lacking a "sophisticated theory" and, thus, operating far below the level of the Greek philosophers.[23] Instead, Legrand finds von Bar to be fetishistically rational, scientific, categorical, monistic, formalist, instrumentalist, and imperial.[24] In short: German. In Legrand's view the case against von Bar is not mitigated by the fact that von Bar's posture seems to be unconscious and involuntary. The German private law scholar is still perpetrating logocide, Legrand argues, because von Bar's pursuit of a European civil code will require him to "chloroform" and "wring the neck" of the common law, with its modest but culturally significant European presence.[25]

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13. *See* Legrand, *supra* note 2, at 39–41; Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631 (2005) [hereinafter Legrand, *Paradoxically, Derrida*]; Pierre Legrand, *The Same and the Different*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240, 245–49, 250–51, 261–63, 288, 300–01 (Pierre Legrand & Roderick Munday eds., 2003);

14. *See generally* Legrand, *Paradoxically, Derrida*, *supra* note 13, at 660 n.159.

15. *See generally* Legrand, *The Impossibility of "Legal Transplants"*, *supra* note 12.

16. *See generally* Legrand, *European Legal Systems Are Not Converging*, *supra* note 12.

17. *See* Legrand, *Antivonbar*, *supra* note 6.

18. *See generally* Study Group on a European Civil Code, http://www.sgecc.net/. *See also* Christian von Bar, *The Role of Comparative Law in the Making of European Private Law*, 20 JURIDICA INT'L 5 (2013); Christian von Bar, *A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities*, 23 TUL. EUR. & CIV. L. F. 37 (2008); Christian von Bar, *A Civil Code for Europe*, 13 JURIDISK TIDSKRIFT VID STOCKHOLMS UNIVERSITET 3 (2001); Christian von Bar, *The Study Group on a European Civil Code*, TIDSKRIFT: UTGIVEN AV JURIDISKA FÖRENINGEN 323 (2000).

19. A fate Legrand is willing to tempt when he acknowledges, in a mocking tone, "How could any 'good European' disapprove of a European civil code?" *See* Legrand, *Antivonbar*, *supra* note 6, at 15.

20. Legrand, *supra* note 2, at 9–10.

21. *See* Legrand, *Antivonbar*, *supra* note 6, at 15.

22. *See id.*

23. *Id.* at 19.

24. *See id.* at 21.

25. *Id.* at 23, 25.

Legrand shows no sign of relenting in this personalized critical crusade. *Jameses at Play* involves a similar *ad homonym* take-down of James Gordley, who Legrand says is guilty of the same sins as von Bar. Legrand accuses Gordley of a "stunningly selective sense of curiosity."[26] Gordley's work, Legrand concludes, offers only "*rigor mortis*" as a result of its "(obsolete) epistemic framework,"[27] its naiveté,[28] its colonial and hegemonic impulses,[29] and its "autistic attitude regarding culture."[30] Legrand argues that Gordley offers only a "narcotizing and crippling comparativism."[31]

There may be a new and less caustic side of Legrand emerging, even if it comes too late to spare von Bar, Gordley, and others. In *Negative Comparative Law*, Legrand warmly praises Günter Frankenberg who has been an "outstanding participant in [Legrand's] intellectual life by virtue of his critique of the theory and practice of 'comparative law.'"[32] And *Jameses at Play* is a comparison of comparatists in which Gordley fares poorly but James Whitman attracts Legrand's approval for (as Legrand interprets his work) occupying "a specifically dissentaneous or aversive intellectual position vis-à-vis . . . the field's governing epistemic doctrines."[33] Legrand applauds Whitman for making the case for an "encultured conception of the law."[34]

Despite his newly accommodating stance, Legrand is widely known for his hostile treatment of fellow comparatists and, by his own account, he has reaped their hostility in return. Legrand documents all of this at the conclusion of *Antivonbar* when, in a breathtaking flourish, he preemptively declares:

> It is now time for all those civilians who have never studied the common law in the common-law world, who have never taught the common law in the common-law world, for whom the common law is a *béance*, to dismiss my argument as "strident", "exaggerated", "extreme", "conservative", "reactionary" — of course, a civil code for Europe is the epitome of a genuinely "cutting-edge" idea: a code to modify other codes...hello Sisyphus! — "pessimistic", "skeptical",

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26. Legrand, *supra* note 2, at 9.
27. *Id.* at 66.
28. *Id.* at 75.
29. *See id.* at 3, 42, 81, 89.
30. *Id.* at 91.
31. *Id.* at 105.
32. Legrand, *supra* note 7, at 406 (citing Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985)). *See* GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE (2016); Simone Glanert & Pierre Legrand, *Review of Frankenberg's Comparative Law as Critique – Law, Comparatism, and Epistemic Governance: There Is Critique and Critique*, 18 GERMAN L.J. (forthcoming 2017).
33. Legrand, *supra* note 2, at 14.
34. *Id.* at 17.

> "destructive" — but what if what is being destroyed is itself destructive? — "anti-European", "caustic", "lofty", "disdainful", "occult", "ponderous", "wrong", "flawed", "esoteric", "hyperbolic", "silly", "blustery", "insubordinate", "somber" perhaps, "bad", "confrontational", "insane", "iconoclastic", "flippant", "innocent", "ambitious", "arcane", "bitter", "recondite", "irreverent" (I have actually heard this one!), "self-serving", "vacuous", "sophomoric", "left-leaning", "right-leaning", "left-wing", "rightwing", "extreme-left", "extreme-right", "wrong-headed", "self-important", "Cassandralike", and "full of crap" (a "collegial" observation that I overheard on the occasion of a colloquium in Paris on 23 March 2001 during the mid-afternoon interlude: ah! ces chers collègues...), or otherwise benighted . . . .[35]

Why was any of this mutually assured disdain necessary? Could Legrand have advanced his important critique of our pathologies without bear-baiting the discipline with these personal attacks? The cynics are bound to suspect that, despite the resulting exile and the disapproval that fuels it, and despite his expressions of dismay at those consequences, Legrand has not regretted the notoriety his attacks have brought him. It is true that Legrand (and a poorly-conceived, poorly-understood characterization of his critique) is present at most comparative law events I attend, even if he is not on the list of speakers. But that explanation is a cheap dodge. There is more to it than martyrdom or self-aggrandizement. Legrand writes the way he does because he cares passionately about our work and the values it embodies and communicates. This points to at least two insights.

First, his fiery approach is itself a stylistic condemnation of the scientized "dispassion" that characterizes the work of most comparatists, suggesting what Legrand considers to be a wholly fallacious and essentially impossible—and therefore worryingly dangerous—impartiality. Christian von Bar, he agonizes, believes—or tells us that he believes—"that the European civil code will be 'impartial', 'dispassionate', and 'neutral'."[36] And, as Legrand emphatically rejects the possibility of these conditions in comparative law, his partial, passionate, and partisan rhetoric is both a critique of this all-too-frequent mantle donned by comparatists and it is a model (even if exaggerated) for a more honest, self-reflective, self-aware approach for the discipline.

Second, Legrand is on the attack because he genuinely sees in the orthodox approaches to comparative law a totalizing (and therefore totalitarian) and intolerant epistemology that has, as those ways

35. Legrand, *Antivonbar*, *supra* note 6, at 37.
36. *Id.* at 15.

of imagining the world always do, disturbingly violent impulses.[37] Transplants, if they were even possible, would displace the local, encultured law. Convergence and harmonization are brutal processes of assimilation with obvious echoes of colonialism. Legal families savagely obscure the plural, diverse realities of law-as-culture. Legrand explains that, "irrespective of anything else, Professor von Bar is doing irreparable violence to the common law" in his pursuit of a European civil code.[38] Gordley faces the same indictment. In *Jameses at Play*, Legrand aligns himself with Whitman's cultural jurisprudence. And he suggests that their critique represents an act of violence aimed at Gordley's positivist comparative law.[39] But this is nothing like the savage harm that Gordley's positivism does "by discrediting culture and dismissing the argument for law-as-culture."[40] Legrand insists that the culturalist's violence strives to do *justice* to the law, even if it will fail fully to do so. But the positivist's violence (as practiced by von Bar and Gordley, for example) tears open a gap between law and justice. This "systematic brutality," Legrand argues, is achieved through the "deployment of control, mastery, subordination, or confinement—domineeringly to drive a wedge between the legal and the cultural."[41] It can be disputed whether Legrand is right about all of this. But no one can doubt that he believes that he is right. And if that is the case, then his barbed critiques (causing trivial collateral damage in the form of some bruised egos) are necessary measures in a desperate struggle to redeem our discipline for tolerance, understanding, pluralism . . . and life. On these terms might it be said that Legrand moves too gingerly?

II. OTHERING LEGRAND

These insights might help us to understand Legrand's place in our discipline. Except that his hostility towards the orthodox approaches to comparative law—and its prominent practitioners—flouts some of the central elements of the Derridean critical theory that animates his work.

37. *See generally* CHRISTIAN GERLACH & NICOLAS WERTH, *State Violence—Violent Societies, in* BEYOND TOTALITARIANISM: STALINISM AND NAZISM COMPARED 133 (Michael Geyer & Sheila Fitzpatrick eds., 2009). *See also* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951); HANNAH ARENDT, ON VIOLENCE (1970).

38. Legrand, *Antivonbar*, *supra* note 6, at 30.

39. *See* Legrand, *supra* note 2, at 18. Legrand seeks to link Whitman to an anti-positivist campaign by noting that Whitman shared Legrand's dismal view of H. Patrick Glenn's seminal work *Legal Traditions of the World*. *Id.* at 14–15 nn.33–34. In fact, in his review of the book, Whitman exhibits the kind of sharp-tongued rhetoric more commonly attributed to Legrand. "Lovers of serious scholarship," Whitman concluded, "are sure to dislike this book," that this is "a poorly executed, self-indulgent piece of work . . . " James Q. Whitman, *A Simple Story: Review of Glenn's* Legal Traditions of the World, 4 RECHTSGESCHICHTE 206–08 (2006).

40. Legrand, *supra* note 2, at 19.

41. *Id.* at 97.

Legrand's harsh words are reserved for comparative law's orthodoxy and its prominent practitioners. In *Jameses at Play*, he explains that orthodoxy consists in a "strategic and generative power, whose hegemonic logic, commands consent on the part of comparativists jointly and severally."[42] So far, in my accounting of Legrand's portrayals of von Bar and Gordley, I have only provided a sketch of what he views the substance of that *doxa* to be. Legrand can make the fuller case for this view in the article that publishes as part of this collection. For my purposes, more detail is not necessary. Instead, it is enough for my examination of the Derridean integrity of Legrand's work, to note that Legrand fundamentally defines his approach in dialectical opposition to the discipline's orthodoxy, whatever he believes that to be. Legrand's categorical dialecticism, for example, calls for comparative law's embrace of "incommensurability (of the kind I advocate)" as a "challenge to Professor von Bar's monism precisely because it holds that the world is irreducibly plural in character, that it is organised, for example, in various modes of cognition that do not fit within a single frame (other than in a perfectly superficial and, therefore, uninteresting way)."[43] Legrand does this repeatedly in his work, insisting on a dichotomy between the discipline's mainstream and his "marginal/oppositional discourse" that is outside of comparative law's center.[44] Legrand's comparative legal studies exists essentially, perhaps exclusively, as a foil for the orthodox in the discipline.

He insists on this dichotomy in part, as I have described above, by disparaging the discipline's leading practitioners. This constitutes a two-fold betrayal of Derrida. First, Legrand seems to fail to internalize the nature and role of the "other" in Derrida's critical theory, which fundamentally rejects the exteriority of the "other." Second, Legrand misses altogether the hospitality Derrida demands that we extend to the "other."

A. The "Self" and the "Other"

It is appropriate to judge Legrand against a Derridian standard. Derrida's critical theory constitutes the philosophical framework for Legrand's comparativism—for his comparison of laws, his comparative legal studies, and his negative comparative law.[45] Legrand is the author and editor of a number of works engaging with Derrida,

42. *Id.* at 3.

43. Legrand, *Antivonbar*, *supra* note 6, at 19.

44. Pierre Legrand, *"Il n'y a pas de hors-texte:" Intimations of Jacques Derrida as Comparatist-at-Law*, *in* DERRIDA AND LEGAL PHILOSOPHY 125 (Peter Goodrich et al. eds., 2008).

45. "I did not beseech Derrida. Rather, he came to me through the very good fortune of a key encounter with a colleague to whom I continue to feel profoundly indebted." Pierre Legrand, *Siting Foreign Law: How Derrida Can Help*, 21 DUKE J. COMP. & INT'L L. 595, 596 (2010–2011).

including an expansive reader linking Derrida and the law,[46] and a number of chapters and articles.[47] A representative example of Legrand's alignment with Derrida is the book chapter *'Il n'y a pas de hors-texte:' Intimations of Jacques Derrida as Comparatist-at-Law*, which appeared in the edited volume *Derrida and Legal Philosophy*.[48] In the chapter Legrand depicts "*his* Derrida"[49] as striving to realize a subversive "politics of location" in the face of "insurpassable alterity."[50] The ethical response to these factors, Legrand concludes, is an embrace of Derrida's affirmation of "the possibility for the other tone, or the tone of an other, to come at any time to interrupt a familiar music."[51] It is, according to Legrand, a "philosophy of resistance to the univocity of meaning."[52] Central to Derrida's critique, as Legrand asserts it, is an affirmation of the "other," on one hand, and the affirmation of the "interpreter-as-he-affirms-the-other," on the other hand.[53] Legrand's project has been the application of these lessons—above all the avowal of the "other-in-law"—to comparative legal studies:

> For Derrida, indeed, something like comparison can only materialize as an affirmative (and unlimited) response to the call of the other. In other terms, comparison's inherent political and ethical vocation can only be as a response to the other. In Derrida's words, "nothing essential will be done if one does not allow oneself to be summoned by the other." . . . Derrida goes further still: not only is there an obligation to the other, but there must also be vigilance *for* the other. It is not enough for comparison to be concerned with the other. Derrida defends a non-totalizing thought, a thought that accepts the other as interlocutor, . . . that allows the other (including the other-in-law) to signify according to himself and to his own *obviousness*, that accepts that the other is not only a modality of the self, that acknowledges the irreducibility of the other to the self, that is, ultimately and emphatically, *for* the other.[54]

Yet, in exaggerating Derrida's insistence on the respect owed to the "other," Legrand is working with an incomplete version of Derrida's summons. Not only does the "other" need to exist according

46. DERRIDA AND LAW (Pierre Legrand ed., 2009).
47. *See* Legrand, *supra* note 45. *See also* Pierre Legrand, *Derrida/Law: A Differend*, *in* A COMPANION TO DERRIDA 581 (Zeynep Direk & Leonard Lawlor eds., 2014); Pierre Legrand, *Jacques in the Book (On Apophasis)*, 23 LAW AND LITERATURE 282 (2011); Pierre Legrand, *The Verge of Foreign Law—With Derrida*, 1 ROMANIAN J. COMP. L. 73 (2010); Legrand, *Paradoxically, Derrida*, *supra* note 13.
48. Legrand, *supra* note 44.
49. *Id.* at 140.
50. *Id.* at 140, 142.
51. *Id.* at 141.
52. *Id.*
53. *Id.*
54. *Id.* at 141–42 (citations omitted).

to his own obviousness, but the "other's" definitive and categorical role in marking out the boundaries of the "self" is so fundamental as to render the "other" an essential, indispensable, and interwoven facet of the "self." They are one. The meaning of this fundamental interdependence of the "self" and "other" is explored in a playful homage to Emmanuel Levinas in which Derrida quotes Levinas as observing:

> 'Responsibility for the other, going against intentionality and the will which intentionality does not succeed in dissimulating, signifies not the disclosure of a given and its reception, but the exposure of me to the other, prior to every decision. There is a claim laid on the Same by the other in the core of myself, the extreme tension of the command exercised by the Other in me over me, a traumatic hold of the other on the Same, which does allow the Same time to await the other.'[55]

Later, in the same essay, Derrida embraces Levinas' metaphor of the parent and the child to illustrate the insuperability of the "self" and "other": "'Paternity is a relation with the stranger who while being Other [*autrui*] . . . is *me*; a relationship of the ego with a self which is nevertheless not me.'"[56]

Legrand never comes close to this kind of reconciliation with the despised orthodoxy of the discipline, which remains structurally exterior—irreconcilably "other"—to his ethics of enculturation in comparative legal studies. He chides von Bar (the Roman-German civilian jurist) with the suggestion that "the common law is Professor von Bar's own other, the difference of his belonging—which Professor von Bar is unable to encounter as addressing his own deficiencies and incapacities."[57] But the same thing must be said of Legrand's hot-pursuit of the discipline's "established academics" and their orthodox approaches. Zweigert and Kötz (it is always these two!) are no less Legrand's own other, the difference of his belonging to our discipline. Legrand needs them more than he admits, so much in fact, that the established scholars he criticizes (von Bar, and now Gordley) represent the very possibility of his critique's existence. They are one.

B. The "Other" and Hospitality

Even if Legrand cannot complete Derrida's difficult journey to the "other" back into the "self," Derrida makes another demand on us in our encounters with the "other." We are to extend the "other" hospitality, not hostility. It should be clear from his persistent aggression towards the discipline's orthodoxy and its prominent practitioners that Legrand has missed this essential summons, too. Because it is the Derridian basis for all Legrand's claims for an

55. Jacques Derrida, *At This Very Moment in This Work*, *in* A DERRIDA READER 405, 413 (Peggy Kamuf ed., 1991).

56. *Id.* at 429.

57. Legrand, *Antivonbar*, *supra* note 6, at 23.

ethical comparative law that affirms and respects the other-in-law, this failing is a more serious problem for Legrand.[58]

Derrida considers hospitality to be so fundamental to human nature and communication that he concludes that it should govern all interaction.[59] It is my argument that, for Legrand the Derridian comparatist, it must also govern his encounters with the discipline's orthodox "others".

There are some recurring themes in Derrida's work on hospitality. Andrew Shryock, for example, describes them (in a comparison with Bedouin philosophy on hospitality) as "most strikingly, the excessive, ideal, impossible, transcendent, and dangerous qualities of the relationship between guest and host,"[60] and more broadly as "themes of welcome, trespass, sacrifice, risk, substitution, lack of calculation, harboring the nameless guest, giving hospitality without reciprocity in mind, as the unexpected act, surprising and selfless, that transcends politics and overcomes the law."[61] Gideon Baker distills Derrida's ethics of hospitality down to this: ". . . where our awareness of the identity of the stranger as a fellow human being seeking refuge is opposed by the irreducible difference of the stranger as 'other' – someone who, as a guest in a home not his own, suffers the violence of assimilation."[62] Judith Still explains that hospitality is "by definition a structure that regulates relations between inside and outside, and, in that sense, between private and public."[63] It is perhaps in Still's sense that the demands of hospitality touch on Legrand's comparativism.

In deconstructing the word "hospitality" Derrida followed its roots to words meaning "stranger," "guest," and "power."[64] This "deconstruction" preserved distance between the host and the "other," maintaining the idea of the host retaining ownership of his property while inviting the "other" into his home ("home" here used loosely, as the "host" could be anything from a single person in a private sphere to a nation).[65] Derrida's "other," in contrast with Levinas's "*Other*," is never capitalized, and is separated from the idea of the "other"

58. "Hospitality is culture itself and not simply one ethic among others." JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS 16 (Mark Dooley & Richard Kearney trans., 2005).

59. *See* Mark W. Westmoreland, *Interruptions: Derrida and Hospitality*, 2 KRITIKE 1, 3 (2008).

60. Andrew Shryock, *Hospitality Lessons: Learning the Shared Language of Derrida and the Balga Bedouin*, 31 PARAGRAPH EUP SPECIAL ISSUES – EXTENDING HOSPITALITY: GIVING SPACE, TAKING TIME 32, 35 (2009).

61. *Id.* at 41.

62. Gideon Baker, *Cosmopolitanism as Hospitality: Revisiting Identity and Differences in Cosmopolitanism*, 34 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 107, 109 (2009). This relates to a pithier idea that preoccupies Derrida: ethics *as* hospitality.

63. *See* JUDITH STILL, DERRIDA AND HOSPITALITY: THEORY AND PRACTICE 13 (2010).

64. *See* Kevin O'Gorman, *Jacques Derrida's Philosophy of Hospitality*, 8 HOSPITALITY REV. 50, 52 (2006).

65. *See id.*

as being a divine entity.[66] Derrida, instead, focused on the "other" in opposition to the person or entity obliged to extend hospitality. The "other" could be a guest, an immigrant, or anyone exterior to the host—perhaps even one's disputant in debates over comparative law theory and method. Derrida viewed hospitality as a host's relationship to the "other," not just the presence of the other in someone's life or country or space. Hospitality, as a relationship with an "other," has to be reinvented constantly as a process of moment-to-moment adaptation to that "otherly" presence.[67] The "other"—whether invited guest, immigrant, or a neighbor one encounters—is, by nature, foreign.[68] It is also possible to reverse perspectives. Instead of defining hospitality as the ethics of our encounters with the "other," it might also be said that anyone receiving hospitality is an "other."

Much of Derrida's philosophy on hospitality reached outside the idea of hospitality in the home and moved into the political sphere, including the space wherein debate over comparative theory and method takes place.[69]

A recurring theme in Derrida's work is the idea of "unconditional" hospitality, the obligation to extend hospitality to absolutely anyone, even if their presence as the "other" is not anticipated or desired. Derrida somewhat confusingly refers to unconditional hospitality as "the Law of hospitality" as opposed to "the laws of hospitality," which would be the duties and rights of the host(s) and guest(s).[70] Derrida said that a host had to be prepared to receive the guest without expecting there to even be a guest: "If I welcome only what I welcome, what I am ready to welcome, and that I recognize in advance because I expect the coming of the *hôte* (guest) as invited, there is no hospitality."[71] This unconditional hospitality never asks the host to demand any type of behavior from the "other," including identification of themselves. Even if that meant giving up "mastery or your home," then so be it.[72] Derrida acknowledged that this was "unbearable," but it was part of pure or unconditional hospitality.[73]

Unconditional (also called "absolute" or "pure") hospitality requires a host to always say yes in his encounters with the "other"

66. This is not to say that Derrida never considers the "other-ness" of something like God. Generally, however, in his work on hospitality Derrida is referring to the lower-case "other" as being human/mortal and not divine. *See* KAS SAGHAFI, APPARITIONS—OF DERRIDA'S OTHER 9 (2000).

67. *See id.*

68. *See* Shryock, *supra* note 60, at 44.

69. Judith Still's book has a chapter dedicated to the relationship between hospitality and religion. *See* STILL, *supra* note 63, at 51–93.

70. Jacques Derrida, *Step of Hospitality / No Hospitality (Pas d'hospitalité)*, *in* OF HOSPITALITY: ANNE DUFOURMANTELLE INVITES JACQUES DERRIDA TO RESPOND 77 (Rachel Bowlby trans., 2000).

71. Shryock, *supra* note 60, at 41 (citing Jacques Derrida, *Hostipitality*, *in* JACQUES DERRIDA: ACTS OF RELIGION 358–420 (2002)).

72. O'Gorman, *supra* note 64, at 54.

73. *Id.*

(Derrida sometimes uses the French word *arrivant*, or newcomer), even without the "other" having to first identify himself.[74] Derrida explains:

> [A]bsolute hospitality requires that I open up my home and that I give not only to the foreigner (provided with a family name, with the social status of being a foreigner, etc.), but to the absolute, unknown, anonymous other, and that I give place to them, that I let them come, that I let them arrive, and take place in the place I offer them, without asking of them either reciprocity (entering into a pact) or even their names.[75]

The idea of unconditional hospitality relies on the fact that it is actually impossible. Derrida frequently acknowledged that the condition of unconditional hospitality depends instead on the existence of "laws of hospitality."[76] According to Still, Derrida's "laws of hospitality" referred to a moral code in social situations as well as political laws and rights.[77] These laws are conditional, and they place restrictions on hospitality. These conditional laws ". . . establish a right to and a duty in hospitality [but] simultaneously place terms and conditions on hospitality (political, juridical, moral), ordaining that this right should be given always under certain conditions: as, for example, that there should exist certain restrictions in the right of entry and stay of the foreigner."[78] Derrida explains the seeming opposition between unconditional hospitality and the conditions needed for its realization by explaining that "conditional laws would cease to be laws of hospitality if they were not guided, given inspiration, given aspiration, required, even, by the law of unconditional hospitality."[79] If unconditional hospitality exists, then an absolute "other" exists in relation to it.[80] This absolute "other" is the "other" that one who practices absolute hospitality must be waiting for; they are absolutely "other" because they cannot be named, cannot have a family name, cannot have a face or figure or origin. They are *truly other*, and absolute hospitality allows a host to say, "I give place to them." Absolute hospitality, in Derrida's view, had to include not only a defined foreigner (whether one from another country or just one from the next house over), but this absolute "other" as well.[81] Acceptance of the

74. *See* Gerasimos Kakoliris, *Jacques Derrida on the Ethics of Hospitality*, *in* THE ETHICS OF SUBJECTIVITY: PERSPECTIVES SINCE THE DAWN OF MODERNITY 144, 146 (Elvis Imafidon ed., 2015).

75. *Id.* at 147.

76. *Id.* at 146.

77. STILL, *supra* note 63, at 5.

78. *Id.*

79. Derrida, *supra* note 70, at 79.

80. *See* Jacques Derrida, *Foreigner Question*, *in* OF HOSPITALITY: ANNE DUFOURMANTELLE INVITES JACQUES DERRIDA TO RESPOND 3, 25 (Rachel Bowlby trans., 2000).

81. *See id.*

absolute "other" requires taking them in without even asking their name, origin, or indeed without asking them to even speak the host's language.

O'Gorman explains:

> For pure hospitality or a pure gift to occur, however, there must be an absolute surprise. The "other", like the Messiah, must arrive whenever he or she wants. She may even not arrive. I would oppose, therefore, the traditional and religious concept of "visitation" to "invitation": visitation implies the arrival of someone who is not expected, who can show up at any time. If I am unconditionally hospitable I should welcome the visitation, not the invited guest, but the visitor. I must be unprepared, or prepared to be unprepared, for the unexpected arrival of any "other". Is this possible? I don't know. If, however, there is pure hospitality, or a pure gift, it should consist in this opening without horizon, without horizon of expectation, an opening to the newcomer whoever that may be. It may be terrible because the newcomer may be a good person, or may be the devil.[82]

Even if unconditional hospitality is impossible, Derrida did not see this unattainability as being indicative of some ethical failing on the part of the host.[83] As one would expect from Derrida, this impossibility merely serves to define its own opposite—the possibility of unconditional hospitality. In the existence of strictly conditioned hospitality we see that unconditional hospitality exists as its opposite.[84] By sustaining the substance of unconditional hospitality in this way, Derrida is able to link tolerance to his demands for hospitality, but as an opposition to hospitality as well. Tolerance, Derrida explains, is actually the opposite of hospitality. Or tolerance is at least the limit of hospitality. "If I think I am being hospitable because I am tolerant, it is because I wish to limit my welcome, to retain power and maintain control over the limits of my 'home,' my sovereignty . . . ."[85]

Hospitality is something that can be seen as dangerous, as it allows the "other" to take something away from the host—including something similar to the academic resources that Legrand accuses the "established" comparatists of enjoying (or squandering).[86] Yet, if hospitality did not carry some risk or danger with it, then it would not be a virtue.[87]

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82. O'Gorman, *supra* note 64, at 54.
83. STILL, *supra* note 63, at 9.
84. Derrida often argues that without at least the thought of this pure and unconditional hospitality, of hospitality itself, we would have no concept of hospitality in general and would not even be able to determine the rules for conditional hospitality. *See id.* at 209.
85. *Id.* at 207.
86. *Id.* at 13.
87. *See id.* at 213.

Marc Crépon, talking of both Derrida and Levinas puts it this way: "[One cannot] speak of hospitality, memory, and mourning without being mindful of all the denials of hospitality, of all the abandonments, all the violent deaths, the deportations, and the extermination of millions upon millions of individuals that mark the last century."[88] Crépon is relating this claim to a mortality of hospitality. But Derrida's theme of violence is still relevant as well. By refusing to extend hospitality to the "other" harm may befall them (in Crépon's case, harm will befall them because the host has not taken into account the mortality of the other).[89] In Legrand's case, however, it is not only the risk that a lack of hospitality might leave his "other" exposed to harm. Instead, by choosing to cast-off Derrida's summons to hospitality, Legrand is free to undertake his contentious hostility toward comparative law's orthodox approaches and their practitioners. As I noted earlier, Legrand has admitted to this violence, which is both the necessary oppositional proof of the existence of hospitality and the affirmative proof of his turning away from Derridian hospitality. It should be obvious that hostility of the kind that characterized Legrand's encounters with the discipline's "established academics" constitutes the negation of hospitality.[90]

CONCLUSION

The *American Journal of Comparative Law*, by publishing Pierre Legrand's article *Jameses at Play*, has stolen the Derridian advantage on Legrand by offering him the hospitality of scores of pages in the present issue. My Article and the rest of the awkward framework for this publication event show the conditionality of the *Journal's* hospitality and at the same time affirm the contrasting possibility of unconditional hospitality to which both the *Journal*—but also Pierre Legrand—are called. It would be Legrand's triumph if his work could be characterized by less-conditioned hospitality (if not unconditional hospitality) toward his "other" (the positivistic orthodoxy in comparative law), on whom he is, in any case, categorically dependent for the existence of his encultured approach to comparative law. Disappointingly, too often and for too long, Legrand has not fulfilled this Derridian mandate. Instead, he has offered the discipline's "established academics" his closed fist. He has closed the door in the face of his guests.

All of this matters because Legrand's Derridan understanding of comparative law has so much to teach us, starting with all the things he advocates about law's social and cultural embeddedness in *Jameses at Play*. But his failure to fully appreciate

88. Marc Crépon, *Hospitality and Mortality*, *in* THOUGHT OF DEATH AND THE MEMORY OF WAR 105, 114 (Michael Loriaux trans., 2013).

89. *See id.*

90. Derrida, *supra* note 80, at 14, 53.

Derrida—including the place of the "other" in the "self" and the duty of hospitality owed to the "other"—is a regrettable self-inflicted wound. Legrand's hostility has given his detractors the excuse to deny him and his work the prominent platform it deserves. More profoundly, in his harsh assessment of his "other," Legrand departs from the Derridian foundations for the tolerant and ethical comparative law to which he so passionately—and correctly—summons us. Legrand, in attacking his "other," harms his "self"—and the discipline that so desperately needs him.