Kischel's Comparative Law: *Fortschritt ohne Fortschritt*

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Not for the first time, the field of comparative law is having to contend with an ambitious work of German scholarship purporting to assume epistemological governance of its theory and practice. On this occasion, the armisonous text issues from a chair at the university of Greifswald. There is, however, no cause for comparatists to worry that Professor Uwe Kischel's massive *Comparative Law* should confute the orthodox lines and boundaries — the proper circumscriptions — according to which established thinking about the comparison of laws has long been inconsiderately proceeding.[1] The set ways are not interrupted, the comfort zone is not disrupted: *there is no dislocation*. Even the occasional tweaking of comparative law's *acquis* keeps matters firmly within the epistemic grooves, more specifically within discernibly German furrows. A translation of Kischel's *Rechtsvergleichung*,[2] *Comparative Law* readily attests to an extraordinary feat of dedication on the part of Andrew Hammel, a lawyer and comparatist in his own right, who practices, teaches, and researches in Germany against the background of a US legal education. It would be remiss of any reviewer, I think, not to praise Hammel on account of the sheer magnitude of his undertaking. Now, *zur Sache selbst!*

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Although I claim decades of first-hand familiarity with German legal culture, with its hegemonic-order means and words (*Rechtsdogmatik über alles!*), and even as Günter Frankenberg was reprimanding Kischel's one-thousand-page *Rechtsvergleichung* for its 'glorifi[cation] [of] a narrowly utilitarian, positivist version' of comparative law,[3] rebuking it as 'little more than a "Fehlerlehre"',[4] admonishing its 'professional naiveté',[5] for example as regards its 'presumption of neutrality',[6] chiding its intellectual confinement to 'authors

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1 Kischel, U (2019) *Comparative Law* Hammel, A (transl) Oxford University Press xxviii & 928 pp (ISBN 978-0-19-879135-5).

2 Kischel, U (2015) *Rechtsvergleichung* CH Beck xxxii & 1010 pp (ISBN 978-3-40-667585-0).

3 Frankenberg, G (2016) '"Rechtsvergleichung" — A New Gold Standard?' (76) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1001 at 1004.

4 Id at 1007.

5 Id at 1003.

6 Id at 1005. As Frankenberg writes, '[t]he presumption of neutrality is not a very promising way to meet the foreign at eye-level': Ibid.

in agreement or voicing only mild dissent' and its censorship of unaligned views,[7] castigating its 'kind words' towards the orthodoxy as 'an attempt to accommodate or pacify the discipline's mainstream',[8] berating its assumptions as 'artificially constructed' and indeed as 'occasionally scary',[9] deploring at once the book's 'generalizations' and its 'narrow discussion[s]',[10] regretting the argument's colonial contention to the effect that 'Latin America belongs to the continental European context',[11] denouncing the author's pretentious assertion that he can supply 'a blueprint for the understanding of all Asian legal orders',[12] lamenting the dismissive heading 'Common Law in the Rest of the World', beneath which Canada, Australia, and New Zealand find themselves addressed as 'Some Former Colonies',[13] and branding the entire effort as 'oblivious to the ethical challenge of any good comparative practice';[14] even as Frankenberg was unhesitatingly holding that Kischel founders somewhat dramatically in his attempt to 'renovat[e] the textbook-tradition in comparative law';[15] and even as Frankenberg was confessing that his '[h]igh expectations [...], nourished by the monumentality of the volume, [had been] disappointed',[16] I somehow kept hoping against hope.

Fellow comparatists-at-law can attest to the fact that as I was awaiting the release of the English version of *Rechtsvergleichung*, I yearned for the opportunity to tell my students in Europe, North America, Latin America, and the Middle East that they could finally confine Konrad Zweigert and Hein Kötz's dated textbook to the historical shelf. More selfishly, I craved the possibility to stop teaching — albeit critically — the woefully impoverished

[7] Id at 1004. Kischel's intellectual policing is so striking that it is legitimate to speak of epistemic injustice vis-à-vis a number of comparatists who have had a significant impact within comparative law, say, since the 1980s (which means a 'window' spanning roughly a half-century). The reasons for Kischel's apprehensive monitoring are not hard to devise and must ultimately resolve themselves in terms of an unwillingness or an inability to engage. Either way, such a fraught renunciation drastically erodes the creditability of the framework being propounded, effectively an untested template.

[8] Id at 1006.

[9] Id at 1009 & 1008.

[10] Id at 1008 & 1003.

[11] Id at 1008. Frankenberg is quoting and translating from the German version, which reads: '*Lateinamerika gehört zum kontinentaleuropäischen Kontext*': Kischel, U *Rechtsvergleichung* supra note 2 at 629. Given the German text, I find Frankenberg's translation just, and I observe that it aptly points to an instance of egregious imperialism of the kind that is extremely hard to reconcile with a decent comparative sensitivity. The English text, however, has the following: 'Latin America belongs to the civil law context': Kischel, U *Comparative Law* supra note 1 at 585. Ignoring the peculiar use of the word 'context' at this juncture, I find this English formulation unobjectionable, and I am confident that Frankenberg would agree with me. Now, given Kischel's insistence that the English text is to be regarded as 'an original creation' (Id at [ix]), the question must arise: what is Kischel thinking, and what is he saying? Which of the two 'original' views is actually Kischel's, the one heralding the inadmissibly colonial stance or the other deploying the prosaics of taxonomy within comparative law?

[12] Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1009. Frankenberg is quoting and translating from the German version, which reads: '*Blaupause für das Verständnis aller asiatischen Rechtsordnungen*': Kischel, U *Rechtsvergleichung* supra note 2 at 731. Kischel's English text has the following: 'a blueprint for understanding all Asian legal systems': Kischel, U *Comparative Law* supra note 1 at 676.

[13] Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1005 n 18. Frankenberg refers to Kischel, U *Rechtsvergleichung* supra note 2 at 378-79. The corresponding English titles, featuring the self-same wording as Frankenberg's English renditions, are in Kischel, U *Comparative Law* supra note 1 at 348-49. Strictly speaking, Kischel's expression is not erroneous in the sense that it is not proferring a misdescription. However, it strikes me as being astoundingly incautious. Can one not expect a comparatist-at-law to prove particularly prudent as regards cultural politics?

[14] Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1005.

[15] Id at 1008.

[16] Id at 1007.

epistemological framework that these German comparatists have been peddling since the 1960s. In the absence of any extant alternative to Zweigert and Kötz's treatise, I wanted to think that Kischel would finally supply, at the very least, a more sophisticated appreciation of the theoretical issues informing comparative law. To be sure, I would still be contending with German legal scholarship and with all the serious liabilities that pertain to this specific cognitive model (not least the ostensibly irresistible lure of *Kommentar*-size work): German legal culture has indeed generated a powerfully self-immuring, self-perpetuating system of legal belief, the major intellectual project under deployment being the maintenance, monitoring, and justification of the complete interdependency between concepts, categories, and definitions; the rigorous inter-organization of everything that is deemed to fit within the system and the vigorous exclusion of everything that is not; and the taming of interpretive play. In fact, it might not be an exaggeration to talk about absolute epistemic self-privileging, that is, the conviction that one's convictions are undeniable, the assumption that one's assumptions are established facts or necessary presuppositions, that the entities that one invokes are unproblematically real, that the terms that one uses are transparent and the senses in which one uses them inherent to the terms themselves, and ultimately that no alternative conceptualization is rationally possible at all. But within such oh-so-conservative cognitive limits, I would be enjoying a theoretical 'upgrade', so to speak. So very little did I know.

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As I turn to my detailed appreciation of *Comparative Law*, I propose for the most part to leave well to one side Kischel's summary of the world's laws. I can only surmise that this largely superfluous accumulation of information is allowed to fill roughly two-thirds of the book in compliance with the orthodox, if profoundly disturbing, expectation within comparative law that a comparatist is, in effect, a summulist. Yet, it beggars belief that comparative-law didactics should generate yet again the hubristic compulsion to produce a (largely inutilious) panoramic survey — which is, structurally, like any purported *totum simul*, fated to evoke innocence or arrogance and to provoke an endless litany of pernicious superficialities, not to mention evidently erratic pronouncements. Can one even begin to fathom an introduction to comparative literature that would feature successive chapters on African literature, Asian literature, Latin-American literature, and so forth? The very idea![17] Meanwhile, I readily accept that Kischel's musings on French legal culture can form a serviceable argument in their own right (after all, French legal culture needs all the critical examination that it can manage to attract from abroad despite the afflicting and mildewing parochialism on which it insists). And I recognize that Kischel's exploration of German legal culture can offer timely reflections for, say, common-law lawyers trying to find their way through that particular thicket. I acknowledge, too, that Kischel's views on English and US law can stand German law students in good stead, not least if they are contemplating postgraduate studies in the United Kingdom or the United States. In each case, Kischel is addressing legal cultures with which he enjoys personal acquaintance, if in varying degrees. In each instance, he is writing about what he has more or less directly encountered. To be sure, all of Kischel's interpretations must prove inherently contestable as befits all interpretive claims. Because meaning is always rooted in the disclosedness of

[17] Eg: Damrosch, D (2020) *Comparing the Literatures* Princeton University Press.

understanding, Kischel's readings of French, German, English, or US legal culture will thus stand or fall in terms of the persuasiveness that they manage to impress on a given reader, who will come to these elucidations equipped with his own set of predilections and predispositions. For my part, I discern here materials for three different monographs, say, 'A German Introduction to French Legal Culture', 'Making Sense of German Legal Culture for the Common-Law World', and 'An Intellectual Guide to Legal Studies in the Common-Law World for Germans'. Be that as it may — and quite apart from the question that I trust I can ask without striking an unduly formalist chord, that is, how *comparative* is Kischel on German law?[18] — I fail to see what the huge compilations and concatenations on display are doing in a primer on comparative law. Perhaps I can adduce a few examples to buttress my reservations.

Seemingly inevitably, one difficulty must concern asymmetrical treatment — a problem that would have been expected to command particular attention from a seasoned *Rechtswissenschaftler*. To give an illustration of the outcome issuing from *Comparative Law*'s preposterous planetary commitment, I refer to Frankenberg one more time as he notes that Kischel 'appropriates [...] only a meager 100 [pages] [...] to Latin America and Africa, only a bit more than the space reserved for "courts and jurists" in France and Germany plus "typical legal institutes" (Rechtsinstitute)'.[19] And what of the question of authority? If I am going to read a German jurist expounding on African or Latin-American laws, I expect him to address me on the basis of close experience of the subject-matter at hand. With particular reference to treatise or textbook writing, I find it difficult to imagine any other way in which a text can claim a credentialed status. But consider these facts.

On his university's website, which I perused in June 2020, Kischel makes available on his personal page a document in English entitled 'Lectures, Addresses and Invitations'.[20] According to this eleven-page list ranging from August 1994 to October 2018, Kischel visited Brazil once in May 2015 and Colombia once in October 2018, both forays therefore subsequent to the release of *Rechtsvergleichung* in April 2015. The enumeration suggests no evidence of a single professional visit to Africa. Still on Kischel's personal page, the *curriculum vitæ* on offer makes no mention of Kischel having ever studied in Latin America or Africa.[21] As I envisage Kischel writing his chapters on Latin-American and African laws, and as I picture him doing so — on the basis of the biographical information that he himself makes available on his web page — before having ever taught or studied in Latin America and without having ever taught or studied in Africa, I am moved to ask about sheer *plausibility*. On what basis is Kischel producing these dozens upon dozens of fewtrils on the laws of Latin America and Africa? On what grounds is he assuming that his text deserves to earn his readership's confidence? Very much the same query must be

[18] My interrogation seems especially pertinent given that for Kischel himself, '[Werner] Menski's study of Hindu law [...] strictly speaking is not comparative but only focused on foreign law': Kischel, U *Comparative Law* supra note 1 at 152 [emphasis omitted]. If a book devoted exclusively to a foreign law fails to qualify as comparative law in Kischel's eyes, what of an account of one's own law (initially, in one's own language, too)?

[19] Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1003. It is somewhat fascinating given this heavily lopsided coverage that Kischel should proclaim how 'the comparative lawyer is expected to start the description of the legal orders under study from a value-neutral perspective': Kischel, U *Comparative Law* supra note 1 at 92-93.

[20] See https://rsf.uni-greifswald.de/lehrstuehle/rewi/oeffentliches-recht/lehrstuhl-kischel/personen/prof-dr-uwe-kischel-lehrstuhlinhaber/ [on file].

[21] Ibid.

asked regarding Kischel's coverage of the laws of Asia and his treatment of Islamic law, not to mention, say, his brief discussion of the laws of Canada and Australia or of the laws of Spain and Israel. And I have not even raised the issues of language and of access to primary materials! Even if Kischel took one or two courses in 'African Laws' or in 'Islamic Law' along the merry way, is this kind of passing exposure enough to justify engaging in textbook-writing on these topics? Enough said, however: a digest of the world's laws appears to entice comparatists like pheromone draws bees, and it seems an unassailable institutional fact of life in comparative law that comparatists will continue to feel able and entitled to hold forth on any heliocentric law whatsoever irrespective of competence or expertise. Personally, I view such sciolous insouciance as extremely damaging to the scholarly status of comparative law. If I may be allowed one more observation on the matter of confidence, I am shocked that a 2019 comparative-law text should be heralding, in the title of its chapter on the laws of Africa, the expression 'African Law' instead of 'African Laws'.[22] The absence of the crucial plural — only one more letter was needed! — unfortunately reinforces the cliché that Kischel should be determinedly unsettling. And if 'African Law', why not, coherently, 'Asian Law'?[23]

As regards Asia, I cannot resist referring to the way in which Kischel, performing an extraordinary *tour de force* indeed, is able to devote three full pages to the British colonization of India without even hinting at the rightly much-bruited fact of oppression.[24] According to Kischel's report, the British in India engaged in 'some cautious modernization, discarding antiquated rules and generally simplifying and organizing the law somewhat'.[25] Reading Kischel, one might be forgiven for thinking about the British as the Indians' prudent benefactors. As it happens, however, Kischel's sanitized statement runs athwart very many scholarly accounts that offer a noticeably different version, *all of them* holding, in effect, that in India, '[t]he imperial system of law was created by a foreign race and imposed upon a conquered people who had never been consulted in its creation. It was,

[22] Kischel, U *Comparative Law* supra note 1 at 631. For the entire chapter, see Id at 631-74. The German title is '*Der Kontext afrikanischen Rechts*': Kischel, U *Rechtsvergleichung* supra note 2 at 679.

[23] There are other difficulties with Kischel's labels. Mostly, his focus is geographic (eg, chapter 8 on 'The Context of African Law' or chapter 9 on 'Contexts in Asia'): Kischel, U *Comparative Law* supra note 1 at 631 & 675. But one is also treated to an alternative perspective altogether (eg, chapter 10 on 'The Context of Islamic Law'): Id at 789. In addition, there is one chapter on the common-law tradition, which is entitled 'The Context of Common Law' (Id at 227), but there are two on the civil-law world, named 'The Basic Context of Civil Law' (Id at 359) and 'Variety of the Civil Law Context' (Id at 517). At times, the word 'context' is in the singular (consider chapter 8 on 'The Context of African Law': Id at 631), while on other occasions it is in the plural (I have in mind chapter 9 on 'Contexts in Asia' but also chapter 11 on 'Contexts of Transnational Law': Id at 675 & 869). Also, as my last two references indicate, there is 'Contexts in [...]' and 'Contexts of [...]'. Such incoherences — incidentally not in the least attributable to the English translation — reveal a lack of rigour and prove distracting to the attentive reader. There is one more important observation to be made as regards this motley collection of headings. Even to the ears of someone who can claim no native competence in English, the different uses of the word 'context' on display in *Comparative Law* resonate very oddly. They are problematic when examined severally, and they prove even more troublesome when considered jointly. In fact, I fear that the idiosyncratic mobilization of the word 'context' makes the headings profoundly unclear. Given the central role that Kischel is assigning to the idea of 'context' throughout his book, the whims and megrims that I indicate are perplexing, to say the least. I note that Kischel's peculiar use of the word 'context' (or '*Kontext*') has also confounded the reviewer of the German text. See Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1009.

[24] See Kischel, U *Comparative Law* supra note 1 at 752-55.

[25] Id at 755.

pure and simple, an instrument of colonial control'.[26] Indeed, Christopher de Bellaigue, the British Oriental Studies specialist, refers to the existence of 'a consensus, shared by many current Indian and Western historians, on the iniquity of colonial rule'.[27] A key actor in this process was undoubtedly Sir William Jones, a British judge and philologist, who arrived in Calcutta in 1783 to sit as a colonial judge. To give a sense of the power dynamics at play, let me mention how Jones referred to locals as 'the deluded, besotted, Indians',[28] the hapless victims of a 'benumbing and debasing [of] all those faculties, which distinguish men from the herd, that grazes'.[29] Jones also called Indians 'degenerate and abased',[30] 'artful and insincere',[31] 'indolen[t], and effimina[te]'.[32] To him, Indian knowledges were weak and defective. To be sure, he was not alone in drawing such conclusions. James Mill thought the Indians 'dissembling; treacherous, mendacious, to an excess which surpasses even the usual measure of uncultivated society'.[33] And, of course, the infamous TB Macaulay, he of the (British) East India Company, the effective corporate ruler of India, wrote that 'a single shelf of a good European library [i]s worth the whole native literature of India and Arabia'.[34] In sum, 'the thoughts and institutions of Indians [were depicted] as distortions of normal and natural (that is, Western) thoughts and institutions'.[35] Mentioning specifically Jones's work, which above all sought to impose English law in India, the leading anthropologist Edward Said writes that the British judge effectively aimed 'to gather in, to rope off, to domesticate the Orient and thereby turn it into a province of European learning'.[36]

Astonishingly, Kischel appears completely oblivious to the manner in which an imperial dynamics of power unfolded in India to ensure the political and legal construction of the colonial subject through the utter disqualification of local ways as they were deemed inadequately developed or insufficiently elaborated with a view, ultimately, to earning taxation rights on the Indians, to fostering a supply of primary goods to nurture the Industrial Revolution in England, and to creating a market for British merchandise. Kischel offers an aseptic, formalist — a 'law-as-science' — version of British colonization that succeeds in making perfectly invisible all epistemic violence whatsoever. (I am not even addressing the *physical* violence, for instance, the savage marauding of Bengal, the most prosperous industrial region of India, that saw the loss of millions of local lives around 1770, mostly victims of a famine caused in substantial part by the ruthless policies that the East India Company had been implementing since 1757 in the name of the discourse of Amelioration.[37]) If anyone is in need of an illustration of how *Rechtswissenschaftslehre*

[26] Tharoor, S (2016) *Inglorious Empire* Scribe at 9.
[27] De Bellaigue, C (11 June 2020) 'The Pillage of India' *The New York Review of Books* 25 at 26.
[28] Cannon, G (ed) (1970 [20 September 1789]) *The Letters of Sir William Jones* [letter from W Jones to W Pollard] vol II Oxford University Press at 847.
[29] Jones, W (1807 [1793]) 'The Tenth Anniversary Discourse, on Asiatick History, Civil and Natural' in *The Works of Sir William Jones* vol III Stockdale at 215.
[30] Jones, W (1807 [1786]) 'The Third Anniversary Discourse, on the Hindus' in *The Works of Sir William Jones* vol III Stockdale at 32.
[31] Jones, W (1807 [1772]) 'An Essay on the Poetry of the Eastern Nations' in *Poems, Consisting Chiefly of Translations from the Asiatick Languages* in *The Works of Sir William Jones* vol X Stockdale at 359.
[32] Id at 348.
[33] Mill, J (1840 [1817]) *The History of British India* (4th ed) Wilson, HH (ed) vol II Madden at 220.
[34] Macaulay, TB (1835) 'Minute [on Indian Education]' http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html at §10 [on file].
[35] Inden, R (1986) 'Orientalist Constructions of India' (20) *Modern Asian Studies* 401 at 411.
[36] Said, EW (1994 [1978]) *Orientalism* Vintage at 78.
[37] To be sure, the company's mercenary and opportunistic actions were facilitated by the collaboration and

can, without any apparent shame, legitimate imperialist pillage in the East — Britain's coercive subjugation of an entire people and its plundering of that people's riches — I unhesitatingly recommend Kischel's summary report on Indian legal history. I am moved to add that such potted and deeply embarrassing instantiation of 'comparative law' — 'It is possible to imagine that, without English intervention, [traditional Hindu] law would have adapted itself to modern society and its complex legal needs in areas such as commercial law'...![38] — is precisely the kind of pseudo-scholarship that gives comparative law a bad name in academic circles and, frankly, most deservedly so. Kischel's bland reference to the 'English intervention' — surely, he means 'British' — prompts me to juxtapose another reading of the matter coincidentally harnessing the identical key term: 'William Jones's intervention [...] represented the full force of the institutional and epistemic weight of Europe that gave it its conditions of felicity. Jones was perhaps the best talent available at that time and place, but it also was one that embodied and gave full expression to the potency of the performative power of British knowledge and its resultant colonialism'.[39]

Given his sketchy and insipid narrative — all the more striking in the light of Kischel's leitmotiv regarding the importance of 'context' — one is particularly stunned to observe that out of his three-page report on India, Kischel manages to devote fully half-a-page to a discussion of whether, in terms of 'legal families', comparatists should classify India with England and the United States or with China and Japan.[40] (A motto might read 'Skip colonization, check classification'.) In addition, I am at a loss to understand why Kischel, in his twenty-page discussion of Indian law,[41] chooses to refer repeatedly to French texts of the '*grands systèmes*' ilk and, in the process, to discuss the Indian constitution without *The Oxford Handbook of the Indian Constitution* or address 'law and social change' in India without Pratiksha Baxi's excellent study of rape trials.[42] The list of obvious omissions is long, but it will be enough to mention also Oliver Mendelsohn's *Law and Social Transformation in India* and Aakash Singh Rathore and Garima Goswamy's *Rethinking Indian Jurisprudence*.[43] Generally speaking, I find it staggering that the pages on India do not feature any reference at all to Professor Upendra Baxi's writings, no mention at all of any of his many books — a stellar illustration of blatant epistemic unfairness.[44] What kind of shoddy research is

partnership of thousands of Indian entrepreneurs, business families, merchants, artisans, bankers, agents, transporters, and intellectuals, who revered the *Angrez* and helped British power survive in India. See generally Dalrymple, W (2019) *The Anarchy* Bloomsbury.

38 Kischel, U *Comparative Law* supra note 1 at 773.

39 Hallaq, WB (2018) *Restating Orientalism* Columbia University Press at 135. *Cf* Bhattacharya, B (2016) 'On Comparatism in the Colony: Archives, Methods, and the Project of *Weltliteratur*' (42) *Critical Inquiry* 677 at 685: '[Jones] employed comparatism in the service of colonial governance'.

40 See Kischel, U *Comparative Law* supra note 1 at 752-53.

41 See Id at 752-73.

42 I refer to Choudhry, S, Khosla, M & Mehta, PB (eds) (2016) *The Oxford Handbook of the Indian Constitution* Oxford University Press; Baxi, P (2014) *Public Secrets of Law* Oxford University Press. On the theme of the constitution, it would be easy to add Bhargava, R (ed) (2009) *Politics and Ethics of the Indian Constitution* Oxford University Press. And on 'law and social change', one could readily note Agnes, F, Chandra, S & Basu, M (2004) *Women and Law in India* Oxford University Press.

43 Mendelsohn, O (2014) *Law and Social Transformation in India* Oxford University Press; Rathore, AS & Goswamy, G (2018) *Rethinking Indian Jurisprudence* Routledge.

44 Eg: Baxi, U (1980) *The Indian Supreme Court and Politics* Eastern Book; Baxi, U (1982) *The Crisis of the Indian Legal System* Vikas; Baxi, U (1985) *Courage, Craft and Contention* Tripathi; Baxi, U (1986) *Towards a Sociology of Indian Law* Satvahan; Baxi, U & Parekh, B (eds) (1995) *Crisis and Change in Contemporary India* Sage. I limit myself to the period that appears to have supplied Kischel with the bulk of his references throughout *Comparative Law*.

Kischel foisting upon his readers, most of them, I suspect, quite unsuspecting? And what do these deficient standards say about the solidity of the references concerning Brazil, South Korea, and the many other laws that Kischel has obstinately resolved to 'cover'?[45]

My reference to 'legal families' prompts me to add that I simply cannot concur with Kischel's fondness for that expression. As I read the twelve pages or so that he feels able to write on this question,[46] the idea that for comparatists-at-law who remain mired in organizational schemes the optimal classificatory scenario should be one articulated around the themes of 'parent' laws, 'offspring' laws, and 'sibling' laws strikes me as very naive.[47] I distinctly recall Professor Bernard Rudden, my Oxford supervisor, instructing me that the common law had never been adopted voluntarily anywhere in the world. Now, what does imperialism, colonization, and conquest have to do with the cozy rhetoric that terms like 'families', 'parents', 'offspring', and 'siblings' readily evoke — *and are meant to connote?* To claim that 'legal families' have 'a clear place and a clear justification' as regards the classification of the world's laws within comparative law is, in effect, to remain blind to five hundred years of geo-politics.[48] I confess that I find it surprising that Kischel should plunge into a somewhat extensive (and, for my money, tedious) discussion of how to articulate the different 'legal families' *inter se* without devoting so much as a sentence to the question of whether the metaphor itself is at all suitable. As Kim Scheppele has had occasion to observe, '[m]etaphors matter in shaping thought, and so it is crucial to get the metaphors right for highlighting key features of the matter under discussion'.[49] (Admittedly, a comparatist who learned in his very first semester of law school how the Privy Council consistently distorted both the Canadian constitution and the Quebec civil code — a comparatist hailing from 'Some Former Colonies'[50] — brings to bear on the term 'family' the kind of sensitivity that may well forever elude a German professor of law.)

However, I must abide by my determination not to immerse myself in 'Kischel on the World's Laws'.

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Moving to examine Kischel's extensive theoretical statement, I am impelled to note that at two-hundred-twenty-five pages or so in its English version (the German text is approximately fifteen percent shorter), this pronouncement stands in all likelihood as the longest thesis on comparative law that I have seen since the publication of Léontin-Jean Constantinesco's three-volume *Rechtsvergleichung* in the 1970s and 1980s, nowadays largely fallen into oblivion.[51] Credulously, I now realize, I felt that such a substantial contention

[45] I notice that the chapter on Asia has materialized *sans* Ruskola, T (2013) *Legal Orientalism* Harvard University Press. And it was written *sans* Seppänen, S (2016) *Ideological Conflict and the Rule of Law in Contemporary China* Cambridge University Press.

[46] See Kischel, U *Comparative Law* supra note 1 at 201-11.

[47] Id at 204.

[48] Id at 211.

[49] Scheppele, KL (2006) 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Choudhry, S (ed) *The Migration of Constitutional Ideas* Cambridge University Press at 347.

[50] Supra text at note 13.

[51] I refer to Constantinesco, L-J (1971, 1972 & 1983†) *Rechtsvergleichung* vols I, II & III Heymann. The absence of an English translation no doubt plays an important role in the fate of Constantinesco's theoretical enterprise. The fact of a (self-translated and updated) French translation (see Constantinesco, L-J [1972 & 1974] *Traité de droit comparé* vols I & II LGDJ; [1983†] vol III [Economica]) appears to have proven insignificant.

as Kischel's, written at the behest of a senior German jurist boasting a postgraduate law degree from a leading US law school (but then Kötz did, too), could just possibly, *just possibly*, offer a noteworthy measure of theoretical solace from what Frankenberg rightly calls the 'methodological bankruptcy' and the 'blatant ethnocentri[sm]' having long plagued comparative law.[52] On the basis of these admittedly very optimistic aspirations — after all, Kischel was trained over many years as a *Rechtsdogmatiker* — I duly acquired both the German and English texts (at a total cost, I may add, of nearly three hundred euros). And I proceeded to allocate six weeks of my best time — my annual Southern California time! — to address Kischel's theoretical claim with the seriousness that I thought it merited. I came to the book in good faith (and, as my close reading of the text would soon show, animated by a much more generous disposition towards Kischel's work than he vis-à-vis mine. Indeed, Kischel does not withhold from repeatedly ray-gunning me. But my heat shield is holding very well.)

A few days proved enough to disconcert me. In fact, I can say that in my forty years of scholarly endeavours in comparative law, I have never before experienced such an alarming contrast between the physical thickness of a volume and the intellectual thinness of the volume's contents. As I have since confided to fellow comparatists-at-law, I found the experience of this unprecedented polarity disturbing. In my bewilderment, I even wondered for a brief while whether such a majestic physical production had not deliberately sought to secure for itself a dispensation from critique. To state the matter otherwise, was the publication of a scholarly text on such a gargantuan scale not meant to reveal, *ipso facto* so to speak, the uncontestable brio of its author to the point where any expression of protest would more or less automatically be lambasted as churlish and thus stultified *ab initio?* Of course, I soon came to my senses: no matter how physically impressive, no matter the page-count or word-count, no matter the number of years of hard labour having underwritten the project (whether by the author, his research assistants, his translator, or his secretariat), and no matter the cost to the *Stiftung Mercator*, Kischel's very decision to release his work *must* entail a disposition to be judged (perhaps as the corollary to the self-assigned entitlement to judge that the work itself reveals). No more than any other book, this text can therefore claim immunity from critique, even from primordial critique, even from critique holding, beyond any tsk-tsking, that the theoretical entreprise on display is so profoundly misconceived that it is severely harmful to the pursuit of meaningful comparative law. To be sure, this is a very strong admonishment, and I do appreciate my retort to be of the most robust type. I hasten to add, however, that I make a firm practice of not marshalling critical words lightly. Let me mention also that there is not the slighest personal dimension to my critique. At this writing, I have never met Kischel. And, frankly, I had never encountered his name until *Rechtsvergleichung* came along — and if I had seen it, I had failed to notice. (As it happens, I taught at Greifswald's faculty of law on two occasions, but both visits happened years before Kischel assumed a chair at the ancient German university. And while Kischel's web page informs me that he taught at the Sorbonne on five occasions from 2011 to 2015, which I did not know, he never made contact.) My reaction, then, concerns strictly the manufacturing and dissemination of certain decisively invidious ideas with specific reference to the theory and practice of comparative law.

[52] Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1006.

Ultimately, my preoccupation arises from the fact that I take comparative law very seriously, not least because I treat it as an antidote (if on a very small scale) to the vulgar nationalism and accompanying xenophobia that has now become one of the essential emergencies in the United States (but also in countries like Brazil, Hungary, the Philippines, Poland, and the United Kingdom) — and that I despise, and that I want to fight with such 'tools' as I have at my disposal. In this respect, I wholeheartedly disagree with Kischel, who feels able to observe within comparative law 'a tendency to take [itself] too seriously'.[53] My experience as regards comparative law has long been diametrically opposite to Kischel's, and for my part I never cease to marvel at the way in which so many comparatists-at-law are content to proceed heedlessly. Yet, I maintain, even against so much evidence to the contrary, that comparative research must be an earnest striving.[54] And this is why I want comparative law to fare well within the academic world. Now, I hold that comparative law can only reach a respectable scholarly standing — vis-à-vis deans, heads of department, fellow law teachers, or law students — if it meets certain basic epistemological standards. I repeat that I came to Kischel's book trusting that it had the potential to become the new orthodoxy in the field of comparative law. Of course, it would therefore face the very problematic intellectual predicament that such status inherently carries on account of the conformism that must accompany the inevitable compulsion to preserve one's epistemic authority. And it would still expatiate as a *German* orthodoxy, thus heralding the unique categorical mindset attendant upon this particular legal/cultural configuration. Yet, it would be propounding an enriched German orthodoxy. Yes. Or so I thought.

My earliest response to Kischel's lenghty theoretical proposition was one of surprise at how his conventional argument features a startling array of jejune assertions, vacuous formulations, and fallacious injunctions — not to mention idiosyncratic choices whereby important comparative research is roundly ignored while ancillary work decidedly confirmed in its adjuvancy over the years is suddenly catapulted into unearned prominence. In my view, *Comparative Law*'s peculiar inclinations reveal, clearly, that Kischel's grip on his sources is far from secure — a fact that must challenge his theoretical model's claim on the reader's trust. Also, the enormous gaps in the research (lacunæ at times so conspicuous, in fact, that one must contemplate the deliberate character of the omissions, an interrogation that returns one to the matter of censorship), not to mention the confoundingly dated character of the references, mean that this text emphatically cannot be recommended as a 'treatise', a 'textbook', or a 'manual' (Kischel's array of words to describe his enterprise, which, it seems, would be everything at once).[55] (In any event, it never made any sense to expect '[b]eginners and advanced students' to read the book 'from the first to the last page' — Kischel's own injunction.[56]) The occasional insights — I assembled a small collection of what I thought were sharp intuitions as I made my frustrated way through the thousand pages or so — are far from sufficient to redeem the whole.

[53] Kischel, U *Comparative Law* supra note 1 at 53.

[54] Accord: Watt, G (2014) 'The Poverty of Economics and the Hope for Humanities in Comparative Law' (9/2) *Journal of Comparative Law* 166 at 167: '[C]omparative law is a serious matter'.

[55] Kischel, U *Comparative Law* supra note 1 at [ix]. In German, Kischel mentions a '*Lehrb[uch]*', indeed a '*groß[es] Lehrb[uch]*', and a '*Lernbuch*': Kischel, U *Rechtsvergleichung* supra note 2 at vii. On Kischel's censorship, see supra note 7.

[56] Kischel, U *Comparative Law* supra note 1 at [ix].

If I can indulge a further expression of my disclaimer, let me say once more that I very much wanted this book to be a success, if a German-orthodox one, and let me add how I find myself thoroughly disappointed that I require to pursue teaching Zweigert and Kötz's rickety theory — that I still have to travel 'coach', in a manner of speaking. As far as I can discern, the only change in my classroom must be that I will occasionally feel compelled to indicate, distressing as I find it, that Zweigert and Kötz's ramshackle pile has now attracted express allegiance from another textbook writer operating within the long-established epistemological parameters, someone moving *in German circles*. Needless to add, I am not seeking to cloak my critique of Kischel's work in the mantle of objectivity or truth. I do not pretend to impartiality for one moment. Not only did I come to comparative law against the backdrop of an upbringing and a legal training having impressed upon me in substantial respects the ways of thinking that broadly characterize any education in the anglophone world, but I have defended for decades an understanding of comparative law that has been heavily influenced by my frequent teaching and research sojourns in the United States and, correlatively, by my inability to make much sense at all of the so-called 'scientific' understanding of law that I have seen being employed all around me in France and elsewhere in continental Europe over the past thirty years or so — a supposedly informed view of law that I find can reasonably be said to reduce legal discourse to scraps of technical or conceptual information locked in ancestral analytical dichotomies whose intellectual authority seems largely indebted to endurance through an age-old and self-sustaining recycling process involving a very strong expectation of epistemic conformity on the part of academics, of their disciples, of their disciples' disciples, and so forth (*Rechtswissenschaft für Schafe?*). Such is, then, roughly speaking, the cultural equipment that I am contributing to my interpretation of *Comparative Law*. Indisputably, Kischel and I are transmitting on entirely different frequencies (not that this fact disqualifies me as a reviewer, not in the least). And given Kischel's very distinct personal itinerary, institutional socialization, and professional trajectory vis-à-vis mine, it appears inevitable to me that there should arise between us a major clash of interpretations. While I have no difficulty whatsoever in casting my approach as primordially interpretive and as interpretively contingent — how could my theoretical formulations ever escape the cognitive enculturation tinged with a measure of temperamental idiosyncrasy that possibilitated them? — let there be no mistake: Kischel's comparatism is also basically interpretive, and it is likewise interpretively contingent; it is also cognitively encultured, and it is is likewise temperamentally idiosyncratic. The idea that Kischel, unlike me, should be able to assert his thinking to be objective and his writing to be true must be seen to be readily unsustainable, indeed risible.[57]

It remains incumbent upon me to consolidate my critical conclusions by adducing compelling proof. I therefore turn to the uncomplicated part of this evaluation.

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[57] Nevertheless, such 'a disposition to uncover hidden ideological motives behind the "wrong" legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology', is frequent amongst jurists including comparatists: Kennedy, D (2020) 'A Political Economy of Contemporary Legality' in Kjær, PF (ed) *The Law of Political Economy* Cambridge University Press at 109.

Two threshold issues call for consideration, not least because they reveal at the outset the chief difficulties plaguing Kischel's enterprise. The first question addresses the purportedly 'scientific' character of law and, by extension, of comparative law. In a footnote that appears to have been added specifically for the benefit of his anglophone readership, Kischel writes that the reference to the word 'science', in connection to law or to the study of law, is 'uncommon' in 'the English speaking world'.[58] Meanwhile, this term, he says, is 'very common in civil law countries like Germany'.[59] Elsewhere in his book, Kischel remarks that '[c]omparative law is a part of legal studies (or, if you will, legal science)'.[60] It appears that one would be faced with a simple matter of usage: over there, they say it like that; over here, they say it like this. In fact, the words 'if you will' suggest that 'legal studies' or 'legal science' can be employed more or less interchangeably, very much depending on the designation that one prefers according to where one happens to find oneself. It is, frankly, very hard to make sense of such flippancy in a comparative-law text aiming to be taken seriously.

Any common-law lawyer having the most passing acquaintance with, say, German law will know that the German understanding of law-as-science is a most primordial intellectual investment that colours in hugely consequential ways every aspect of German legal culture. Before all else, to contemplate law as a science or to envisage the study of law as a scientific pursuit has immediate reverberations as to one's understanding of the meaning of law, of what counts as law. At the very least, a jurist's commitment to scientificity will render interdisciplinary pursuits problematic — indeed, so-called 'law and' endeavours have been contemptuously mocked in Germany. To put the matter otherwise, it is very difficult to reconcile law-as-science with anything other than densely logical studies of what is dogmatically deemed to be the 'legal'. And a pursuit of scientificity has profound ramifications as regards the value that one attaches to analytical work, for instance, to conceptualization and to systematization — to *rationalization*.[61] Unsurprisingly, to hold law or the study of law as pertaining to science has considerable implications for the way in which the law is researched, written (whether statutorily, judicially, or doctrinally), or taught — and, of course, the commitment to science carries huge consequences as regards *what* is researched, written, and taught as law. It is not at all hyperbolic to contend that the understandings of law-as-science and of law-as-not-science refer to two world-views, to two paradigms. Precisely because they are so fundamental, these perspectives are anything but exchangeable. Indeed, for a common-law lawyer science no more pertains to law than science-fiction concerns astronomy.

I have just mentioned the common-law lawyer vis-à-vis German law, but surely the disconcertion runs as deep for a German jurist making his way to the United States, say, to one of 'the best law schools' where, Kischel opines, 'there is relatively little discussion of currently applicable law', where '[t]eaching tends instead to focus on social, political, or economic aspects of law, as well as the law's impact on questions of sex, race, and class'.[62]

[58] Kischel, U *Comparative Law* supra note 1 at 28 n 111a.

[59] Ibid.

[60] Id at 160. The German text has only 'legal science' and reads as follows: '*Die Rechtsvergleichung ist ein Teil der Rechswissenschaft*': Kischel, U *Rechtsvergleichung* supra note 2 at 173.

[61] See generally Kischel, U *Comparative Law* supra note 1 at 385-90.

[62] Id at 279. Let me add that I have had the honour to teach at one of the best law schools in the United States for the past ten years or so and that my personal experience is at considerable variance from Kischel's

Given that Kischel has himself experienced the move from one paradigm to the next — and, presumably, re-experienced it any number of times during his academic career as an expert in comparative constitutional law — it is dumbfounding that he can reduce the debate around the scientificity of law to a simple question of nomenclature. In the meantime, the very fact that *Comparative Law* is devoting over one-hundred-ten pages to method is an excellent indication — seemingly unbeknownst to Kischel — of what happens when one opts in favour of the so-called 'scientific' approach.[63] And the further fact that Kischel feels able to write more than fifteen pages on painstaking formalistic delineations between comparative law and other disciplines — comparative law is not 'Legal Translation', not 'Legal History', not 'Sociology of Law', not 'Legal Ethnology', not 'Legal Ethology', not 'Legal Anthropology', not 'Private International Law', and not 'Comparative Politics'[64] — supplies more evidence of the kind of obsession that focuses one's attention when one is operating under the sway of the purportedly 'legal-scientific' mindset. Although the entire exercise seeking to show that these various disciplines are 'clearly distinguishable' from comparative law would strike the common-law lawyer as inconsequential,[65] it tallies neatly with the German lawyer's 'fond[ness]' for 'clear definitions and well-defined concepts'.[66] In other words, it agrees with the idea of 'law-as-science'.[67] Still in the superfetatious footnote that I am discussing, Kischel sends his anglophone readers who would like to know more on 'law-as-science' to a paper written in German and published in a German law review in 2009.[68] This manifestly unhelpful cross-reference to scholarship in the German language raises various difficulties that I find convenient to address without delay as they offer further evidence of the strong German streak sustainingly informing the text.

With the apparent exception of the added footnote on law-as-science, *Comparative Law* seems to comprise exactly the same thousands upon thousands of references than *Rechtsvergleichung* — which means that *Comparative Law*, like *Rechtsvergleichung*, is replete with credits to German scholarship written in German and published in Germany. But what good are these authorities for an anglophone readership? Is it not the case that the very idea of an English translation of the one-thousand-page *Rechtsvergleichung* is premised on the determination that non-German-speaking comparatists should also have access to Kischel's work? But if the English translation is meant for non-German-speaking comparatists, what point all these German references? At times, the situation becomes

affirmation. Not only do my US colleagues occupy themselves with 'currently applicable law', but there is a strong student demand specifically for that kind of teaching. And, in US law schools, as Kischel ought to know, student expectations are not taken lightly.

63 Id at 87-200. Somehow, though, no reference is made to the excellent Monateri, PG (ed) (2012) *Methods of Comparative Law* Elgar.

64 Kischel, U *Comparative Law* supra note 1 at 10-26.

65 Id at 10.

66 Id at 17. Even the pledge to categorical thought, however, fails to spare Kischel's reader from a passage to the effect that '[t]he question of how much [...] comparative law can or should learn from legal sociology remains unresolved': Ibid.

67 According to Kischel, the only field out of his list with which comparative law could arguably claim an 'intimate' connection is private international law. This is so in particular when 'the applicable law [...] requires evaluation of the substance of the potentially applicable national legal norms', what Kischel styles a 'search for the substantively "better" rule' — which he calls 'a task precisely suited to comparative law': Id at 23. Given Kischel's overall positivist orientation, it is hardly startling that the only discipline with which he contends that comparative law harbours meaningful affinities happens to be, out of the various fields that he brings to his discussion, the only discipline operating as 'black-letter' law.

68 The reference is to Id at 279 n 275.

frankly preposterous as when the anglophone reader is given, in addition to the original reference to a text in English by a US Supreme Court Justice, a further reference *in extenso* to its published German translation.[69] On the whole, the sheer number of references to German scholarship in German published in Germany suggests that Kischel was effectively writing for a German readership and for a German readership only (as Zweigert and Kötz did before him). It is not that the English translation came as an afterthought, as it was in all likelihood planned from the start. However, not the least effort has been made to review the references and adapt them to an anglophone readership, which leads to very many odd situations of the kind that I have just mentioned. By way of additional example, the anglophone reader who wishes to learn more on French legal education is invited to refer to four publications, all four of them in German (including an unpublished text, which should prove of especial interest in Canterbury or Chicago).[70]

But Kischel's unwillingness to tailor the references to anglophone readers has another consequence, which is that the 2019 English text does not include any sources more recent than 2014 — what would have been the chronological limit for the German edition released in 2015. The anglophone reader is therefore presented with one-thousand-pages or so worth of authorities that are at the very best five years out of date. To put the matter differently, the 2019 *Comparative Law* does not feature a single reference to anything that appeared in print after 2014. Now, I note how Kischel asserts that 'there are some rules which the comparative lawyer must obey if he wishes to avoid mistakes'.[71] Although, for my part, I resolutely eschew comparative research by rules, I very much hope that for my fellow comparatists who do believe in rules, a basic rule is to bring one's references up to date — especially if one is pleased to refer to one's work as 'a contemporary, in-depth study'.[72] In this regard, the sub-section on the concept of '*cause*' in French law reveals the lack of currency in an all-too-glaring fashion.[73] In 2016, '*cause*' — one of the conditions for the formation of a legally valid contract ever since the coming into force of the French civil code in March 1804 — was abolished on the occasion of the implementation in France of the long-awaited statutory reform of the law of obligations. Were readers of *Comparative Law* not entitled to be informed that the English edition's three full pages or so having to do with '*cause*' are effectively treating a defunct concept?

The barrage of references in German and the stunning lack of currency of the source materials in general are particularly problematic, I think, if one bears in mind Kischel's prefatory declaration that he aimed to produce 'a translation that reads not like a translation, but like an original creation'.[74] It is regrettable to say that as far as references are concerned, this gambit has failed rather spectacularly. Indeed, the footnotes consistently and blatantly read like a translation. Moreover, they read like a largely futile and dated translation. In the process, the anglophone reader is getting very short shrift indeed.

I heralded two threshold matters requiring scrutiny. After law-as-science, part of the overall heavy German imprint on the book (discernibly extending to the English version of the text), the second topic that I want to raise concerns precisely the question of translation.

[69] Id at 77 n 147. For another example along analogous lines, see Id at 20 n 71.
[70] Id at 476 n 415.
[71] Id at 88.
[72] Id at 89.
[73] Id at 494-97.
[74] Id at [ix].

Let me repeat at once the prelusive words that I just quoted to the effect that Kischel sought, for his English text, 'a translation that reads not like a translation, but like an original creation'.[75] Is it unfair to assume, in the light of such formulation, that Kischel regards translation as a 'lesser' form of writing? Indeed, he insinuates that a 'translation' of his German text — I am minded to add a 'mere' translation — would have been inadequate or insufficient from his point of view. There had to be more. Specifically, there had to be 'an original creation'. In a key sense, one is immediately returned to law-as-science and to the disciplinary delimitations that come with an exclusive focus on legal analytics. As a German jurist always-already committed to 'law-as-science', Kischel knows very little, if anything, about translation studies. How can I tell? My guess is not difficult given that the downgrading or denigration of the text-in-translation is an idea that, quite simply, no sophisticated translation theorist has been countenancing in a long time. Indeed, the received understanding within contemporary translation studies is very much that the text-in-translation cannot be deemed a 'lesser' text than the original on account of the fact that it would feature a loss of meaning (I have in mind the old saw that something would be lost in translation). In other terms, the fact that the text-in-translation is inherently neither equivalent nor identical to the source-text cannot entail its automatic devaluation. After all, since the text-in-translation is structurally unable to generate an equivalence or an identity with the source-text, it cannot make any sense to stigmatize it on that score, that is, to denounce it for what it is structurally incapable of achieving. Would there be any sense in considering chicken a lesser food than fish for the sole reason that it cannot swim?

While any equivalence or identity between the text-in-translation and the source-text is structurally impossible — there is simply no way in which I can say in English Camus's famous incipit in *L'Etranger*, '*Aujourd'hui, maman est morte*', in a manner that would make the English text equivalent or identical to the French one[76] — translation theorists hold that a translation deserves to be acknowledged as a complex interpretive act in its own right, as an intervention that requires writerly and intellectual acumen on its own terms, as a text that demands keen cultural awareness both of the source-language and of the target-language and, in the case that particularly interests comparative law, both of the source-law and of the target-law, both of the source-legal-culture and of the target-legal-culture. In translation, what there is happening, and all that there can be happening, is an iteration (a term that Kischel would no doubt dismiss as jargon on account of his unfamiliarity with it). The word 'iteration' is a helpful locution inasmuch as it refers to a repetition with a difference, a sequence that captures well what takes place in the course of a translation. The translator repeats the text that he found in the source-language, but he repeats it with a difference, necessarily so, since he is repeating it in another language. 'Iteration' thus points to the idea of a second original, which is precisely how translation theorists have come to apprehend the text-in-translation. While the second original therefore enjoys an important measure of autonomy, it is not fully independent of the source-text since it must relay it — indeed, it is *of* it. Along the way, the text-in-translation may well generate a productive process of innovation and change in the target-language — a contribution that will feature in the evaluation being made of the merits of a specific text-in-translation. Again, for

[75] Ibid.

[76] See Glanert, S (2020) '"Aujourd'hui, maman est morte": traduction littéraire et droit comparé' (4) *Revue Droit & littérature* 373.

Kischel to maintain that he does not want his English text to read like a 'translation', but that he wishes it instead to appear as an 'original creation', shows that he is not apprised of current translation theory and offers an excellent example of what happens when a 'legal scientist' purports to make a point beyond legal analytics without making the effort — and it is an *effort* — to acquaint himself with the tenets of epistemological governance within the other discipline (not to mention also the contrapuntal precepts hailing from dissidents within the other discipline). Translation studies recognizes the fact that *a translation is, perforce, an original creation — that it is the first original, originally again, if differently*.[77] Kischel's casting of the two expressions as opposites reveals, at best, hackneyed thinking on his part.

Even as he acknowledges that '[w]ithout translations, the enterprise of comparative law is almost impossible' (personally, I would promptly delete the adverb),[78] Kischel's inadequate grasp of the important epistemological issues pertaining to translation is regrettably made even more apparent in the less than three pages that he devotes to the matter beyond the words out of his prologue to the book that I have just discussed.[79] Early in the course of this very brief additional conspectus, Kischel writes as follows: 'Those who are interested in Japanese law but who cannot at least read Japanese must rely on translations'.[80] Ignoring the fact that this sentence is stating the blindingly obvious, I find it extraordinary that Kischel should appear to be suggesting that both types of comparatists researching Japanese law (those who can read Japanese and those who cannot) are somehow operating on a level footing. In the preface to *Comparative Law*, after all, he himself is suggesting very differently as regards his own book, without seemingly being aware of the inconsistency that I am emphasizing. Recall that Kischel evokes how in his eyes a translation must abide a lesser status, so much so that with respect to the English edition of his text he writes how he wanted 'a translation that reads not like a translation'.[81] To return to the Japanese example, Kischel's message now appears to be completely different: if you can read Japanese, you go ahead reading it; and if you cannot, well, you go ahead relying on translations. Elsewhere, however, Kischel does acknowledge one drawback arising from linguistic limitations. He styles 'the fact that the comparative lawyer does not know the relevant language' a 'deficit' that 'greatly restricts his ability to gather information'.[82] Here, it seems, it is no longer the case that language ability is irrelevant. Once again, it is difficult to know what Kischel is effectively thinking. His text is not clear. (Incidentally, I consider that there is infinitely more at stake in comparative research than the 'gather[ing] [of] information'.)

Be this confusion as it may, the fact is that comparative law makes inescapable demands on comparatists in terms of foreign-language proficiency even as comparatists find themselves bound by inescapable limitations on their ability to work in foreign languages. Given this conundrum, it is unfortunate that Kischel did not seize the opportunity to address a few basic epistemological questions in order to provide his readers with some elementary material for further reflection, at the very least. Perhaps I can offer a few

[77] Cf Derrida, J (1998) *Psyché* (2nd ed) vol I Galilée at 217: 'The original gives itself by modifying itself [...], it lives and survives in mutation' ['*L'original se donne en se modifiant (...), il vit et survit en mutation*'].
[78] Kischel, U *Comparative Law* supra note 1 at 10.
[79] Id at 10-12.
[80] Id at 10.
[81] Id at [ix].
[82] Id at 32.

examples of the indispensable interrogations that I have in mind. Is it necessary to be in a position to read the primary materials (say, the statutes and judicial decisions) in the original language in order to be able to write creditably on foreign law?[83] Or is it fine to work from translations, which makes one's report effectively a 'tertiary' account? Can a 'tertiary' statement legitimately hope to do justice to foreign law? When one translates, ought one to 'stick' to the original as closely as possible at the risk of making the translation read 'funny', or should one want to ensure that the translation reads seamlessly even if this means moving away from the letter of the original text? In other words, should one foreignize the translation in order to remind one's reader that he is reading a foreign text, or should one domesticate the original so that the reader forgets that he is reading a foreign text? To mobilize a simple illustration, consider the word '*pitangas*' in the Portuguese sentence '*Eu amo colher pitangas*'. Should the London-based English translator write 'I love picking Brazilian cherries' or even 'I love picking *pitangas*' (thus registering or signalling the foreignness of the source-text through the translating language since '*pitangas*', strictly speaking, are not cherries)? Or should he write 'I love picking cherries' (thus selecting the closest local fruit, the one that will readily speak to an English readership in Ontario — although, in fact, cherries are not '*pitangas*')? And is it required for the comparatist-at-law to supply the original quotations in his text (say, in his English text) in addition to his English translations, presumably by way of parenthetical information in the notes, so that the competent reader can proceed to an immediate confirmation if he so wishes? Also, is it important to have one's translations — say, one's English translations — verified by a native speaker in the original language before one releases them in print?

Astonishingly, and I would say irresponsibly, not only does Kischel decline to research these cardinal issues with a view to being able to offer commendable stances on them, but he even refuses to raise them. With extraordinary casualness, he concludes that translation is not for comparatists, but for translators. While I readily understand the grip that traditional disciplinary delimitations are exerting on Kischel-the-German-jurist, it cannot make any sense to claim that translation 'remains the translator's task',[84] if only for obvious practical reasons. (Meanwhile, if translation is 'the translator's task', why supply five pages of examples of mistakes in translation — some interesting, others callow — in a book expressly destined for comparatists-at-law?[85]) Unlike Kischel, most comparatists do

[83] Some distinguished critics of Glenn, HP (2014) *Legal Traditions of the World* (5th ed) Oxford University Press, hold that linguistic competence as regards primary materials is indeed necessary. Eg: Foster, NHD (2006) 'Islamic Law As Tradition: Chapter Six of *Legal Traditions of the World*' (1/1) *Journal of Comparative Law* 147 at 150; Jackson, BS (2006) 'Internal and External Comparisons of Religious Law: Reflections from Jewish Law' (1/1) *Journal of Comparative Law* 177 at 180.

[84] Kischel, U *Comparative Law* supra note 1 at 12.

[85] See Id at 175-80. It is unfortunate that this treatment of mistakes in translation (broadly understood) should be introduced by such an inane statement as 'It is generally beginners who make translation mistakes. However, even experts are not immune': Id at 175. But then, *Comparative Law* features other weird assertions on translation. Eg: Id at 11: '[T]ranslation problems are much more manageable in multilingual countries which share a common legal order (such as Belgium or Canada) — even if the results may not be particularly pleasing, aesthetically'. '[M]uch more manageable'? '[R]esults not [...] pleasing'? It is unclear to me what Kischel has in mind. Of course, he does not offer any illustration to support his claims so that I cannot have any idea why a translation issue would be 'much more manageable' in Brussels than in Berlin while simultaneously featuring 'results [...] not [...] particularly pleasing' — and, so Kischel holds, less 'pleasing' in Brussels than in Berlin. Finally, the idea of a 'common legal order' strikes me as very problematic. To frame my concern as economically as I can, even if Kischel is aware that Canada is a federal state, he does not appreciate the significance within the Canadian federation of a major constitutional entity hailing in important legal respects from the civil-law world.

not enjoy access to a *Stiftung* allowing them the luxury to hire a professional translator. In practice, comparatists must translate foreign law themselves, which is precisely why it would have been helpful for Kischel to foster in his readership a critical consciousness as regards translation. Needless to add, *Comparative Law* features not the slightest inkling of the challenging ethical and political stakes that the act of translation obligatorily involves. Hence, one meaning of the title of this review essay: '*Fortschritt ohne Fortschritt*' can signify 'progress without progress'. While Zweigert and Kötz ignored translation completely through the three successive editions of their book — that is, over more than thirty-five years — Kischel is addressing the matter. This is progress. But he is doing so in such a perfunctory and unbeneficial way, in such disorderly fashion, too, that not only is Kischel's readership not further advanced, but there is a serious risk that readers can indeed be misled into the assumption that, like Kischel, they simply do not have to think for themselves about translation since, well, translation is for translators and for translators only.

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Beyond these two initial sets of observations on Germanness (as regards law-as-science and references to scholarship in the German language) and on translation, I want to articulate a critique of Kischel's theoretical construction. The heart of Kischel's thesis is method — I mean, of course, *his* method, that is, the method that he chooses to deploy in order to ensure that his epistemological investigations reach ideologically congenial conclusions.[86] In this regard, and without so much as interrogating the very idea of 'method' in the first place — I mean the idea of *any* 'method'[87] — Kischel offers a resounding endorsement (in fact bordering on cringing obsequiosity) of Zweigert and Kötz's functionalism, which he variously calls 'seminal', 'iconic', 'impressive', 'straightforward', 'directly appealing', 'clear', and 'exemplary'.[88] Indeed, he reckons, '[a] short textbook could limit itself to [a] discussion [of Zweigert and Kötz's functionalism], add a few examples, and then bring the treatment of method to a close'.[89] But Kischel is writing a very, very long book. Accordingly, he moves to an extensive survey of critiques of functionalism and of alternatives to functionalism. Surprisingly, Kischel's discussion of functionalism's critics, although spanning twelve pages,[90] overlooks George Fletcher and Richard Hyland, one a distinguished and long-standing opponent of functionalist thinking in comparative law,[91]

See Id at 350-51. Given Québec, then, can one genuinely do justice to Canadian legal complexity by reducing it to a 'common legal order'? I suspect that analogous reservations could be entered regarding Kischel's simplistic treatment of Belgium. For comparatists-at-law with a serious interest in legal translation who most rightly wish to reach beyond platitudes, an excellent point of departure is Glanert, S (ed) (2014) *Comparative Law — Engaging Translation* Routledge. Also under Simone Glanert's editorship, see the special issue of *The Translator* — a well-known journal in the field of translation studies — on law and translation: (2014) 'Law in Translation' (20/3) *The Translator* at 255-547.

86 Cf Woolf, V (2008 [1921]) 'Modern Fiction' in *Selected Essays* Bradshaw, D (ed) Oxford University Press at 10: 'Any method is right, every method is right, that expresses what we wish to express'.

87 For her part, Simone Glanert bravely challenges the assumptions that method must somehow be *sine qua non* for comparative law and that comparatists therefore inevitably require to indenture themselves to a method. See Glanert, S (2012) 'Method?' in Monateri, PG (ed) *Methods of Comparative Law* Elgar at 61-81. Kischel does not appear to be aware of the existence of this text, what I consider a thoughtful and thought-provoking essay.

88 Kischel, U *Comparative Law* supra note 1 at 88-89.

89 Id at 89.

90 See Id at 90-101.

91 Eg: Fletcher, GP (1987) 'The Universal and the Particular in Legal Discourse' *Brigham Young University Law*

the other the author of what is, in my view, the most convincing critique of functionalism in comparative law on offer in the English language.[92] Interestingly, perhaps, at least for those who do not mind hodge-podge, Kischel chooses to use the specific sub-heading 'Criticizing Functional Comparison' in order to place his wide-ranging attack on what he styles 'postmodernism'.[93] Now, it is very odd to find such an all-embracing intellectual movement as 'postmodernism' being addressed within the straitened strictures of method and within the even narrower restraints of functionalism. To say the very least, there seems to be a spectacular lack of 'fit' between the two themes — one 'large' ('postmodernism'), the other 'small' (method/functionalism). Indeed, the fact that the 'large' topic is being subsumed within the 'small' one points to a disadjustment that may suggest, amongst various hypotheses, a significant lack of understanding on Kischel's part of what he disdainfully labels 'postmodernism'. In fact, the organization of *Comparative Law*'s materials discloses further chaos when, half-way through the general discussion of 'postmodernism', one finds a subject heading that reads 'Postmodern Criticism of Comparative Law'. In order to parry undue bemusement, it is worth pausing to consider Kischel's architectonics *ipsissimis verbis*. The relevant headings and sub-headings are as follows:

'Chapter 3: The Comparative Method
- A. The Methodological Problem of Comparative Law: An Overview
- B. The Starting Point: Functional Comparison
- C. Criticizing Functional Comparison
  - I. Criticizing the Process
    - 1. The Function in Law
    - 2. The Process of Comparison
    - 3. The Cultural Context
    - 4. Neutrality
  - II. Criticizing the Background
    - 1. Fixation on Unity
    - 2. Positivism, not Realism
    - 3. Goal Definition
    - 4. Isolation
  - III. Postmodern Critique
    - 1. The Problem of Description and Self-Description of Post-modern Texts

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[92] Hyland, R (2009) *Gifts* Oxford University Press at 63-74 & 94-113.

[93] For Kischel's discussion of 'postmodernism', see Kischel, U *Comparative Law* supra note 1 at 97-101. Predictably, the loud persiflage that was always-already intended, seemingly in advance of any reflection on the work being pilloried, had to lead to some remarkable howlers. As it happens, I do not know any comparatist-at-law who thinks that all forms of reason are 'equally worthwhile' (Id at 98), that 'every attempt at evaluation' must be 'categorically reject[ed]' (Id at 100), and that 'all solutions proposed by all legal systems are equally valid' (Id at 101). I can very well see, though, how these unsupported affirmations — *all three statements are unsupported* — make for racy writing. Kischel himself styles his account 'fair' (Id at 100), momentarily forgetting, it seems, his own call for 'Modesty in Comparative Law': Id at 31-34. I take no exception, however, to Kischel's statements to the effect that '[t]he very manner in which a comparative lawyer poses a question is already influenced by his prior understanding and thus by his native legal culture' (Id at 100), that 'texts can have no unambiguous meaning' (Ibid), and that '[c]omparative law is not about truth' (Id at 101). *Pace* Kischel, these three enunciations are epistemologically *unimpeachable*.

2. Basic Concepts of Postmodern Thinking
3. Postmodern Criticism of Comparative Law
D. Alternatives to Functional Comparison
I. [...]'.[94]

It may be that my twenty years of teaching at the Sorbonne have made me over-sensitive to the significance of a well-constructed *plan*, but I cannot see, as I have mentioned already, how a wholesale discussion of 'postmodernism' (C/III/1 and C/III/2) belongs within a consideration of the comparative method (Chapter 3) and within a consideration of the critique of one comparative method in particular, functionalism (Chapter 3/C). Note, indeed, the broad scope of the sub-headings devoted to 'postmodernism' (C/III/1 and C/III/2) as opposed to the exiguity of the other sub-headings at the same level (eg: C/II/1, C/II/2, C/II/3, and C/II/4). My further contention is that I do not understand how, having focused his discussion on method and functionalism (Chapter 3/B and Chapter 3/C), Kischel suddenly widens his range dramatically to include, by way of a sub-sub-sub-heading, the whole of comparative law (C/III/3). Magnanimously, as is my wont, I leave to one side the semantic extension of 'postmodernism' except to observe that, in *Comparative Law*'s usage, the term appears to stand for a concoction of the theories that Kischel does not care to understand or to engage. But I am no doubt simplifying.

Turning to what he regards as the '[a]lternatives to [f]unctionalism' on offer within the field of comparative law, Kischel presents me with an opportunity to discover a colleague whose name I have never encountered over the years (and I *do* keep up to date).[95] He also fosters my re-acquaintance with work that I had long ago identified, even as I remained mindful of the principle of charitable interpretation, as obsolete,[96] indolent,[97] insignificant,[98] immature,[99] or anodyne[100] — the lack of visibility that these writings have suffered since they were published suggesting that my views are far from being unwarranted. Not less confoundingly — and presumably because he attaches such significance to method — Kischel addresses under this umbrella designation a wide range of topics, including many themes that one would not expect to see treated at this juncture, such as 'statistical comparative law' (in particular, 'legal-origin' theory),[101] so-called 'legal trans-

[94] Id at 97-102. Nothing appears to turn on the English translation. See Kischel, U *Rechtsvergleichung* supra note 2 at 92-109.

[95] See Kischel, U *Comparative Law* supra note 1 at 110-12. I quote the sub-heading: Id at 110.

[96] See Id at 102-04.

[97] See Id at 104-06.

[98] See Id at 106-10.

[99] See Id at 112-30. The adjective that I use concerns specifically work published in the 1990s under the designation 'comparative law and economics' or a variation thereof. Kischel seems to agree with me as he refers to 'an interesting label [more] than [...] a strict theoretical framework which is to be transferred to comparative law along with all its nuances, structural components, and theoretical disputes': Id at 130. The reader will observe, however, that Kischel is devoting many more pages to this 'method' than to any other on his list. While I hold that such an extensive discussion is excessive in relative terms, whether from a descriptive or prescriptive point of view, the imbalance that I mention is perhaps not so anomalous given the author's abiding values as they emerge from a reading of his book.

[100] See Id at 130-34.

[101] See Id at 134-43. I agree with Kischel that '[a] closer analysis of statistical comparative law shows that its methods and basic assumptions are often clearly influenced by a pronounced economic liberalism': Id at 141. And I concur that 'statistical comparative law can say little concerning one of the fundamental questions of comparative law, namely *why* two legal systems differ in a certain way': Ibid. But I dispute Kischel's disputation of the findings of the World Bank's *Doing Business* reports. In Kischel's words, '[t]he idea that someone who

plants',[102] 'jurisprudence',[103] and 'legal traditions'.[104] Unaccountably, 'postmodernism' makes a second appearance (which, in passing, it is not at all easy to articulate with the first).[105]

It is noticeable that, whether as regards 'comparative law and economics' or 'statistical comparative law',[106] Kischel offers a lenghty treatment of economic analysis. While, say, history and anthropology are to be kept at arm's length,[107] 'there can be little objection *in principle* to law and economics in comparative law'.[108] However, it is very much unclear, comparatively speaking, on what basis involvement with economic analysis is readily awarded such hallowed status in contradistinction to other alliances across disciplines. After all, economics, which assumes to be speaking identically everywhere (think of the language of transaction costs or externalities), is hardly appreciative of local knowledge (for example, of culture or of what Kischel styles 'context' and chooses to place at the very heart of *Comparative Law*'s theoretical model). Yet, Kischel does not share his reasons for bestowing upon economic analysis his most-favoured-discipline treatment. Meanwhile, Gary Watt, whose excellent work Kischel fails to address (while electing to make much space for writing far less sophisticated by practically any standard), holds that law and economics is 'poor preparation for engagement with societies',[109] that is, for any decent comparative research. Contrariwise, Watt maintains, 'the extra-disciplinary voices of the humanities are advantageous to comparative law scholarship on account of the ways in which they open the legal ear to hear more fully what the outsider is trying to say'.[110] Kischel is entitled to disagree, but it seems to me that he can hardly assume the case for economics to be self-evident for all readers to appreciate, in the way he does.

wants to start a business is genuinely better off in Botswana than in France, and not a lot worse off in Armenia, seems more than doubtful': Id at 139-40. Now, let me react bluntly: on what basis does Kischel hold it to be 'more than doubtful' that starting a business in Botswana cannot operate under more auspicious circumstances than in France? What is the empirical data supporting his claim? What does Kischel know about Botswana and about economic life in Botswana (or about launching a business in France, for that matter)? I discern here the kind of colonial prejudice that regrettably infects *Comparative Law* at many turns (I provide a few illustrations of the relevant predisposition in this essay), even as Kischel claims to show awareness of 'legal-cultural imperialism' as 'a problem': Id at 48. Incidentally, the World Bank's *Doing Business* reports are released annually, and they are made readily available for free on the Internet. It is unclear why Kischel chooses to refer specifically to the dated 2006 edition only.

[102] See Id at 143-44.

[103] See Id at 144-46.

[104] See Id at 146-49. These pages are largely devoted to Glenn, HP *Legal Traditions of the World* supra note 83. Regrettably, they do not include any mention of Martin Krygier's publications, long regarded as pioneering scholarship on the subject-matter of law as tradition. Eg: Krygier, M (1986) 'Law As Tradition' (5) *Law & Philosophy* 237; Krygier, M (1988) 'The Traditionality of Statutes' (1) *Ratio Juris* 20. Even more curiously, the discussion of Glenn's work does not make any reference to Glenn's prominent critics. I refer in particular to the collective review featuring more than a dozen sharply critical experts and spanning one hundred pages. See Foster, NHD (ed) (2006), 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 100. What is the sense of this absence in Kischel's text? Is it that Kischel does not know about the collective review, or is it rather that he does not want his readership to know? Either way, I suggest that the omission reveals a serious problem of creditability in the confection of *Comparative Law*.

[105] See Kischel, U *Comparative Law* supra note 1 at 151-52.

[106] Supra notes 99 & 101.

[107] See Kischel, U *Comparative Law* supra note 1 at 12-15 & 19-20.

[108] Id at 130.

[109] Watt, G 'The Poverty of Economics and the Hope for Humanities in Comparative Law' supra note 54 at 167.

[110] Ibid.

Given a statement very early in his book to the effect that 'functional comparative law does not use any preconceived or even national legal categorization or terminology',[111] and in the light of his representation of '[t]he functional perspective' as 'a metaphor for the fundamental questions and solutions of modern comparative law, its core mission, and its tried and tested methodological approach',[112] I was not in the least startled to read, at the end of his extensive summary of critiques and alternatives as he sees them (an eighty-six page study),[113] that Kischel should conclude in favour of the need to salvage functionalism,[114] a doctrine that would have been operating 'without much dogmatism'.[115] While I am mostly willing to defer to my German colleague in matters of dogmatism, I find that when Zweigert and Kötz are calling functionalism '[t]he *basic* methodological principle of *all* comparative law' and when they are claiming that comparative research can only be conducted in terms that are '*purely* functional',[116] they are betraying a rather dogmatic disposition, thank you. In any event, Kischel's conclusion is firm: 'The basic mindset of the functional method can [...] be approved without reservation'.[117] (I am reminded of the anthropologist's quip: 'Many a gallant knight has gone forth to do battle with the functional dragon only to see him slip away and continue his mischief'.[118]) On account of this vibrant validation, it is understandable that Kischel, as if making a quilt from a set of old patches, would likewise do his best to safeguard not only comparative law's '*præsumptio similitudinis*' and comparative law's (deeply contradictory) search for the best law, but also the comparatist's posture of (alleged) neutrality — three further hallmarks of what stands for *Comparative Law* as Zweigert and Kötz's enthralling model.

As I read Kischel, his advocacy of the '*præsumptio*' is less than fulsome. In fact, he seems to be struggling for an adequate vocabulary to describe the place of the '*præsumptio*' in comparative law. In the end, he insists that the '*præsumptio*' is 'after all, [...] a mere assumption or working hypothesis',[119] and he expressly frames the '*præsumptio*''s valency in terms of 'practical experience' while apparently refraining from endowing it with any theoretical heft.[120] For my part, even leaving to one side my puzzlement that practice should somewhat readily be found able to escape theorization, I hold that assumptions or hypotheses matter a great deal. Specifically, to embark on a comparative study presuming that laws are inscribed in commonality is bound to have very detrimental heuristic

111 Kischel, U *Comparative Law* supra note 1 at 8.
112 Id at 9.
113 See Id at 87-173. Frankenberg refers to an exercise in 'pasteuriz[ation]': Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1006.
114 See Kischel, U *Comparative Law* supra note 1 at 166-73.
115 Id at 173.
116 Zweigert, K & Kötz, H (1998) *Introduction to Comparative Law* (3rd ed) Weir, T (transl) Oxford University Press at 34 [my emphasis]. For the German text, see Zweigert, K & Kötz, H (1996) *Einführung in die Rechtsvergleichung* (3rd ed) Mohr Siebeck at 33 ['*(d)as methodische Grundprinzip der gesamten Rechtsvergleichung*'/'*rein funktional*'].
117 Kischel, U *Comparative Law* supra note 1 at 173. I find that the words 'without reservation' are particularly noteworthy. The German text has '*uneingeschränkt*': Kischel, U *Rechtsvergleichung* supra note 2 at 187.
118 Orans, M (1975) 'Domesticating the Functional Dragon: An Analysis of Piddocke's Potlach' (77) *American Anthropologist* 312 at 312.
119 Kischel, U *Comparative Law* supra note 1 at 168. Kischel indifferently writes '*præsumtio*' (eg: Id at 168) or '*præsumptio*' (eg: Id at 627). I have streamlined the spelling to '*præsumptio*'. And I have done so silently (thus intervening more selflessly than Kischel himself: cf Id at 62 n 69). The English translation has duplicated the incoherence stemming from the German text, which also casually features '*præsumtio*' (eg: Kischel, U *Rechtsvergleichung* supra note 2 at 181) or '*præsumptio*' (eg: Id at 675).
120 Kischel, U *Comparative Law* supra note 1 at 168.

consequences indeed — which is why I advise my students to proceed in diametrically opposite fashion and to investigate how laws are different on the surface, in depth, and in-between. I find it disquieting — like Frankenberg[121] — that Kischel should be emphasizing the practicality of the '*præsumptio*'. When I teach it (I do try to give the orthodoxy a fair hearing!), I always tell my class that one must apply the principle of charitable interpretation and assume that Zweigert and Kötz cannot have meant the '*præsumptio*' to operate at the descriptive level, that it must pertain to the prescriptive realm — to the world of wishful thinking. Indeed, the '*præsumptio*' cannot have anything to do with the laws as they exist since, as anyone who has first-hand experience of laws in more than one country must know, laws actually differ *inter se*. By connecting the '*præsumptio*' with 'practical experience', that is, by denying me my charitable reading of the '*præsumptio*', Kischel is leaving me bereft.

A consideration of the '*præsumptio*' can easily segue into a discussion of the convergence debate.[122] It is good, I think, that Kischel should devote almost twelve pages to an examination of this disputation.[123] But the treatment on offer is unclear. Early in his investigation of the issues, Kischel calls the discussion '[o]verrated'.[124] However, he then proceeds to style the convergence thesis in its various instantiations as, amongst other critical terms that he harnesses, 'not very informative',[125] 'heedles[s]',[126] 'vulnerable',[127] and 'premature'.[128] Kischel indeed concludes that whatever convergence may have taken place historically between the civil-law and common-law worlds — he claims that there has been '[a] certain degree' of it as 'a matter of fact'[129] — 'has not even begun to elide the considerable substantive differences between the common law and civil law, and, even more importantly, differences in legal context. We are still not even close to a situation in which lawyers from both worlds could happily recognize a genuine similarity, a comparable mindset, or sufficient mutual intelligibility'.[130] (And, if I may add, one of the principal reasons for this lack of understanding concerns the fact that the civil-law tradition is heavily invested in the idea of 'law-as-science', very much unlike the common law.[131]) While I would have marshalled different words, I endorse Kischel's acknowledgment of significant differences across the two legal traditions. But why, then,

[121] See Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1004 n 13.

[122] Indeed, Kischel expressly draws this connection as he mentions 'the *præsumptio*, and the convergence thesis which flows from it': Kischel, U *Comparative Law* supra note 1 at 627.

[123] See Id at 619-30.

[124] Id at 621 [emphasis omitted]. The German term is '*überbewerte[t]*': Kischel, U *Rechtsvergleichung* supra note 2 at 669. I refer to a subheading.

[125] Kischel, U *Comparative Law* supra note 1 at 622.

[126] Ibid.

[127] Id at 626.

[128] Id at 628.

[129] Id at 630.

[130] Ibid.

[131] From a common-law standpoint, the civil-law's 'science envy' paradoxically stands as an acknowledgement by the civil-law world of the law's inconsequence even as one of the civil law's epistemic trademarks has long been the extolment of the law. (I am reviewing these lines near the Zattere and, as if on cue, I find myself coming across Cacciari, M & Irti, N [2019] *Elogio del diritto* La nave di Teseo.) In effect, it is as if only science could bring respectability to the law, as if only science could cure the law of its indeterminacy and relieve it of its obfuscations and subterfuges. And then, there is the further complication that even as they are in search of the esteem that would come with the epistemological robustness that they associate with the 'scientific' attitude, civil-law lawyers completely fail to recognize the diversity, messiness, and incompleteness of actual scientific practice.

mitigate the significance of the discussion? Why would the debate be '[o]verrated'?[132] If the promoters of the convergence thesis are as mistaken as Kischel takes them to be, it seems that a contestation is in order and that Kischel should welcome a counter-argument rather than try to belittle the significance of the conflict. Again, his position is unclear.

The altercation regarding the opportunity of a European Civil Code that visited the European Union throughout the 1990s and 2000s — Kischel calls it an 'intense controversy'[133] — would have suited *Comparative Law*'s pages on convergence. However, while Kischel addresses the matter, he chooses to do so elsewhere in his book.[134] As I agree with Kischel that '[c]omparative law is an exercise in humility',[135] I leave it to comparatists who are conversant with the conflict on a European Civil Code and who are familiar with its protagonists to assess whether Kischel's only two references, both of them to texts in German, both texts having been authored by German academics and published in Germany, and both texts being fully favourable to the idea of a European codification,[136] whether this sole pair of references, then, does justice to the disagreement of the day and to the breathless front-page excitement that it generated in law reviews all over Europe. Likewise, to assert that '[e]ven the opponents of a European Civil Code showed a friendly attitude towards the [Lando Principles of European Contract Law]' suggests that Kischel did not witness the same debate as other European comparatists-at-law.[137] (To be sure, Kischel's affirmation remains unsupported so that it is unclear who he has in mind.) Incidentally — and in a way that could be amusing if it were not so profoundly *dangerous* — Kischel introduces the said Lando Principles as a would-be 'neutral system of legal rules for cross-border commerce'.[138] Even as I am prepared to allow for the beliefs that come with law-as-science *und so weiter*, I cannot but find it exceedingly preoccupying that there are law teachers who continue to peddle the idea of a 'neutral system of legal rules', who still believe — and seemingly seriously, too — that '[i]t may indeed be easy to find a neutral standpoint on a relatively straightforward topic such as the legal conditions for a successful contract'.[139] Distressing as it is, it very much appears that one has somehow to accept that there we still are, epistemologically speaking, twenty-one years or so into the twenty-first century.[140]

[132] Supra text at note 124.
[133] Kischel, U *Comparative Law* supra note 1 at 67.
[134] See Id at 67-68.
[135] Id at 31.
[136] Id at 67 n 90.
[137] Id at 68.
[138] Id at 67.
[139] Id at 93. On the topic of neutrality, I am perplexed that Kischel should be maintaining how it is possible to be more neutral in certain areas of law than in others — or, to state the point at issue from a different angle, that some fields of the law would feature more value-neutral rules than others. See, eg, Id at 93 & 627. But then Kischel is working as a *Rechtswissenschaftler*. Moreover, this 'sliding-scale' argument raises the matter of boundaries and of boundary-criteria. For instance, Kischel claims 'many parts of the law of obligations' as 'more neutral legal areas': Id at 627. Does he include the law of damages? Does he include the law of delicts? Does he include the law of unjust enrichment? Does he include the contract of sale? Does he include the contract of employment? All these legal issues can be said, at least on a broad understanding of the subject-matter, to pertain to the law of obligations. How does one draft the line between the 'more neutral [...] areas' and the not-so-neutral others? And is this line itself 'neutral' — or does its location happen to depend on who is drawing it and, say, where it is being drawn?
[140] In *Comparative Law*, Kischel mentions the value of anecdotes in the course of comparative research. See Id at 33. I agree. Along the lines of anecdotal theory, therefore, I wish to refer to Kischel's intervention before the British Association of Comparative Law, at the University of Central Lancashire, in Preston, UK, on 3 September

As I have indicated, quite apart from the '*præsumptio similitudinis*', Kischel is keen to retain 'better-law' and neutral comparison within his model. Not unlike the situation prevailing with respect to the '*præsumptio*', however, what *Comparative Law* styles 'the search for the best solution' finds itself qualified.[141] For Zweigert and Kötz, '[o]ne of the aims of comparative law is to discover which solution of a problem is the best'.[142] According to Kischel, however, '[t]he judgment of which solution is better' is but 'a permissible, if by no means required way to end a comparative study'.[143] Although one regrets that any hierarchization of laws was not strictly and expressly confined to the realm of personal

2019, as Professor Geoffrey Samuel helpfully reported it to me (I was then 8500 km away). In the course of the discussion that followed his speech, Kischel referred to the proposition 'A contract is formed with the meeting of the wills of the two parties' as an illustration of what he regards as a 'neutral' legal enunciation, that is, as law *sans* culture, so to speak. Both Professor John Bell and Professor Samuel, then in attendance, replied to this claim. In correspondence [on file], Professor Bell indicated to me that his principal objection to Kischel had been that the idea of the 'will' is closely tied to German philosophy in general and to Kantian philosophy in particular so that it can hardly be claimed to be devoid of 'cultural baggage'. For a detailed argument along these lines, Professor Bell recommends Rouhette, G (1989) 'The Binding Nature of Obligations' Bell, J (transl) in Harris, D & Tallon, D (eds) *Contract Law* Today Oxford University Press at 57-63. In separate correspondence [on file], Professor Samuel mentioned how he retorted to Kischel that the will has historically been foreign to the common-law way of approaching the formation of contracts, a matter that common-law judges have traditionally considered from an 'objective' rather than a 'subjective' standpoint — in other words, a question that they have envisaged from a perspective that does not allow the will to play any significant normative role. Upon reading Professor Samuel's explanation, I was swiftly reminded of the very first case that I was asked to read in my basic contract law course forty years ago, practically to the day at this writing. My excellent teacher at McGill University was Professor Michael Bridge, and he had assigned *Tamplin* v *James* (1880) 15 ChD 215, a brief late-nineteenth-century English decision involving the sale of real estate. In *Tamplin*, the court ordered specific performance against the buyer even though he had made a mistake regarding the contents of the sale (on the basis of his personal acquaintance with the property, he had thought that certain gardens came with the land when, in effect, they were not part of the sale). What was significant for the court was not whether the buyer's will had been *ad idem* with the seller's, that is, the court was not concerned with what the buyer had had in mind or with how his mindset had not fitted the facts of the contract so that he could now invoke the doctrine of mistake in order to be excused from performance, which is what he wanted. Rather, the court's decision turned on a so-called 'objective' analysis. I recall Professor Bridge: would a reasonable person have deemed the particulars of sale to have been clear? If so, such 'objective' assessment carried — again, irrespective of the actual buyer's actual will. Three judges of the Court of Appeal, confirming the single judge in Chancery, thus held unanimously in favour of the seller and ordered specific performance against the buyer, who was thereby compelled to proceed with his purchase. It is key to note that the resolution of the dispute did not focus on the actual buyer's actual state of mind — *the case did not emphasize his will*. In sum, the making of an enforceable contract was seen to depend not on the agreement of two minds in one intention, but on the deemed meaning of a set of signs (the particulars of sale) external to the mind. I distinctly recollect Professor Bridge expediting *Tamplin*. Evidently, this was elementary contract law. What students had to realize, in short order, was that formation of contracts in the common-law tradition was approached very differently from the way things were done in the civil-law world, with which they had become acquainted in law school the year before. In further correspondence [on file], Professor Samuel observed that the decision to marginalize the will in *Tamplin* is particulary remarkable since, being an action for specific performance, the matter was adjudicated in the *Chancery* Division (a decision later confirmed by *three* judges of the Court of Appeal). It is striking that even the law of equity — despite having been heavily influenced by canon law and Roman law — would refuse to attach significance to the will. Professor Samuel also commented that *Tamplin* is hardly the most famous case making the legal argument it does. He thus recalled the celebrated English Court of Appeal decision in *Carlill* v *Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA). In Professor Samuel's words, *Carlill* 'reinforces the point that contract is about the enforceability of an objective promise seriously made and supported by consideration. It rejected the idea that there must be subjective agreement between the company and Mrs C[arlill]'. *Quaere*: Is Kischel's proposition 'A contract is formed with the meeting of the wills of the two parties' a 'neutral' legal enunciation, then? *Is any legal enunciation 'neutral', ever?*

141 Kischel, U *Comparative Law* supra note 1 at 159.

142 Zweigert, K & Kötz, H *Introduction to Comparative Law* supra note 116 at 8. For the German text, see Zweigert, K & Kötz, H *Einführung in die Rechtsvergleichung* supra note 116 at 8.

143 Kischel, U *Comparative Law* supra note 1 at 160.

preference, one likes to sense some movement in the direction of less judgemental comparative research. Of course, to say that comparatists may refrain from ranking laws cannot mean to suggest that they will work — or that they can work — impartially. In effect, the very heavy imbalance in *Comparative Law*'s references in favour of German legal scholarship in the German language attests how simplistic it is for Kischel to write that 'the comparative lawyer is expected to start the description of the legal orders under study from a value-neutral perspective' or how naive it is to state that 'comparative lawyers are expected to avoid allowing their own prejudices to influence their study of other legal systems'.[144] Mimicking Zweigert and Kötz in this respect as in so many others, Kischel combines the illusion that he can operate outside culture with an utter lack of appreciation for the strength of the cultural apparatus that *determines* his thinking as comparatist-at-law. Yet, in so many substantial and formal ways — in so many discernible respects — Kischel's *Comparative Law*, like Zweigert and Kötz's earlier text, vigorously asserts itself as *a German legal/cultural product*.

To return to the unqualified vindication that Kischel grants to functionalism (he adopts it 'without reservation'),[145] it is strange that, but a mere eight lines later, he is seen to be contending how 'it makes sense to abandon the term "functional comparative law" while holding fast to its basic idea' — and this, in order to avoid the 'distraction' that the word 'function' has generated.[146] It is this deflationary outcome, a somewhat baffling functionalism-that-must-not-dare-tell-its-name, that paves the way to the unfolding of Kischel's own method, which he proceeds to expose over approximately twenty-five pages.[147]

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As I read him, Kischel must make two preliminary moves — to commend hermeneutics and to castigate culture — before he is in a position to develop his method (not that *Comparative Law* is at all so clearly sequentially structured, tough). By way of a first motion, he requires to burnish his hermeneutic credentials, which he does, if summarily, over seven pages or so.[148] For Kischel, the 'hermeneutical method',[149] as he styles it, deserves a *scientific* status on a par with the analytical methods of the social sciences (in Greifswald, the clasp of science is decidedly very strong).[150] Kischel discusses 'an approach in which the object of study is to be understood on its own terms in its respective context'.[151] He underlines thus certain key features of hermeneutics: '[To] attempt to describe and understand phenomena as best we can, in an integral and holistic manner, as free from preconceived categories as possible';[152] to bring to bear 'knowledge of many individual facts and background information to develop an ever clearer understanding, a better feel for the object of the inquiry';[153] to deploy an 'empathetic process requir[ing] a long and

144 Id at 92-93 & 169.
145 Supra text at note 117.
146 Kischel, U *Comparative Law* supra note 1 at 173.
147 See Id at 173-200.
148 Id at 153-60.
149 Id at 157.
150 See Id at 158.
151 Id at 156.
152 Ibid.
153 Ibid.

intensive familiarization with [the] subjec[t]';[154] and to mobilize 'constan[t] vigilan[ce] to prevent [one's] own thoughts and conceptions from intruding ahistorically into the life situation under study'.[155] Kischel adds that '[h]ermeneutics is also characterized by the so-called hermeneutic circle. [...] To understand Thomas More, it is necessary to understand the England of his time, which in turn means understanding Thomas More, since he is a part of that England'.[156]

While Kischel observes that hermeneutics has mostly applied to historical research, he argues that 'there are close parallels between the intellectual interests of comparative law and those of history, which makes it possible to place comparative law within the most august family of academic disciplines shaped by hermeneutics'.[157] If I may cast the confusing matter of augusteity aside, Kischel holds that, '[l]ike historians, comparative lawyers need intuition honed by experience, and the process of understanding is, for them, just as much a matter of slowly familiarizing oneself with the material. The hermeneutical circle is also a given: [t]o compare the law of evidence in Germany, England, and the USA, a comparative lawyer must already know not only something about these legal systems in general, but also have some idea of the evidence law in all three countries'.[158] Kischel continues: 'Historical interpretation, which requires the scholar to work himself into a different context and familiarize himself with its intellectual landscape until he is at ease within it, also describes the core of the comparative approach'.[159] In his apparent enthusiasm, Kischel falls for what he derides throughout his book as 'postmodernist jargon' (or words to that effect). Accordingly, he refers to '[t]he very element of comparison, of engagement with *the other*' and to the need to 'develop a sense of [...] specific *"otherness"*'.[160] Be such nomenclaturing indecision as it may, Kischel states his conclusion firmly: 'The approach of comparative law is, therefore, hermeneutical'.[161] He quickly enters a qualification, though: 'Nevertheless, comparative law does take an analytical approach when it is useful to find the best solutions'[162] — this restriction to the range of hermeneutics seemingly being inserted because 'the search for the best solution does not primarily involve a foreign legal order on its own terms'.[163] Even as I concede not to be able to make sense of the proviso (or of the artificial distinction that Kischel draws between hermeneutics and analytics), my intellectual limitation does not seem consequential since Kischel immediately contradicts himself by adding that '[t]he judgment of which solution is better [...] is possible only on the basis of [...] a contextual understanding', that is, of a hermeneutic appreciation.[164] Like hermeneutics itself, then, Kischel's thinking seems to be circular. It is, at any rate, unclear.

[154] Ibid.
[155] Id at 157.
[156] Ibid [emphasis omitted].
[157] Id at 158-59. Note that for Kischel the 'close parallels' that he observes cannot refer to the idea that legal history would be but 'comparative law in time': Id at 12. Indeed, in his view, 'legal history and comparative law [...] diverge in fundamental ways', the main distinction being that '[h]istorical law cannot be observed in action today': Id at 13.
[158] Id at 159. See also Id at 33, where Kischel likewise insists on the relevance of 'intuition and a host of experience'.
[159] Ibid.
[160] Ibid [my emphasis]. These *Schreibfehler* also appear elsewhere in the book. Eg: see Id at 304 & 322.
[161] Id at 159.
[162] Ibid.
[163] Id at 159-60.
[164] Id at 160.

Like Kischel, although without his proviso, I have long argued that foreign law needs to be understood 'on its own terms'.[165] (Contrary to Kischel, however, I contend that this pursuit is ultimately doomed to fail since, when all is said and done, the self cannot be the other and cannot therefore understand the other 'on its own terms', an outcome that I consider ultimately beneficial — but this is another story.) Also, I concur with Kischel as regards the significance of the 'feel',[166] the importance of 'empath[y]' and 'familiarization',[167] and the relevance of 'intuition' and 'experience'.[168] What I am unable to understand, however, is what 'feel', 'empath[y]', and 'experience' have to do with method, in line with Kischel's model. I should have thought that such vectors of understanding were rather resolutely antithetical to the very idea of 'method', which must imply at least some threshold orderliness or patterning — an observation that brings me to Hans-Georg Gadamer.

To anyone the least bit conversant with hermeneutics, the very term immediately evokes Gadamer — not unlike the way in which a reference to the categorical imperative at once conjures Kant, mention of the social contract Rousseau, and Zarathustra Nietzsche. Whether one unhesitatingly agrees with Gadamer or radically disagrees with him, no good-faith academic would deny that he is both the pioneer and, without the shadow of a doubt, the most influential defender of hermeneutics on the hither side of 1900. Not at all insignificantly from the standpoint of law, in his master-work, *Wahrheit und Methode*, Gadamer actually devotes a number of pages to legal hermeneutics.[169] Yet, to my dismay, Kischel does not so much as acknowledge Gadamer's existence. This omission is far from inconsequential.

Gadamer very firmly holds, for example, that hermeneutics is *not* a method. Indeed, Gadamer could hardly be more explicit: '[H]ermeneutics [...] is not itself a method'.[170] He also writes that '[t]he hermeneutic phenomenon is originally not a problem of method at all'.[171] For Gadamer, 'faith in method', in fact, risks 'an actual deformation of knowledge'.[172] And while Kischel maintains that 'understanding the various legal systems from an inside perspective [...] is a principal goal',[173] and as he refers to the need to 'acquir[e] an objective understanding',[174] Gadamer is adamant that 'one understands *differently*, *when*

[165] Supra text at note 151. For a representative instance of my claim, see Legrand, P (2006) 'Comparative Legal Studies and the Matter of Authenticity' (1/2) *Journal of Comparative Law* 365.

[166] Supra text at note 153.

[167] Supra text at note 154.

[168] Supra text at note 158.

[169] See Gadamer, H-G (1986) *Wahrheit und Methode* (5th ed) Mohr Siebeck at 330-46. For the English translation, see Gadamer, H-G (2004), *Truth and Method* (2nd English ed) Weinsheimer, J & Marshall, DG (transl) Continuum at 320-36.

[170] Gadamer, H-G (1981 [1978]) 'A Classical Text — A Hermeneutic Challenge' Lawrence, F (transl) in Kresic, S (ed) *Contemporary Literary Hermeneutics and Interpretation of Classical Texts* University of Ottawa Press at 328. This text has appeared in English only.

[171] Gadamer, H-G *Wahrheit und Methode* supra note 169 at 1 ['*Das hermeneutische Phänomen ist ursprünglich überhaupt kein Methodenproblem*']. Adde, eg: Caputo, J (2018) *Hermeneutics* Penguin at 89: 'Hermeneutics itself is neither a *method* nor a meta-methodology that monitors particular methods'; Bruns, GL (1992) *Hermeneutics Ancient and Modern* Yale University Press at 8: '[Hermeneutics] is not a method'.

[172] Gadamer, H-G *Wahrheit und Methode* supra note 169 at 306 ['*Glauben an die Methode*'/'*eine tatsächliche Deformation der Erkenntnis*'].

[173] Kischel, U *Comparative Law* supra note 1 at 160.

[174] Id at 156.

one understands at all'.[175] In other words, '[u]nderstanding is not mere reproduction of knowledge'.[176] Exit the 'inside perspective' and 'objectiv[ity]', then. And even as Kischel urges 'constan[t] vigilan[ce] to prevent [one's] own thoughts and conceptions from intruding ahistorically into the life situation under study',[177] Gadamer contends that '[w]anting to avoid one's own concepts in interpretation is not only impossible, but obvious absurdity. To interpret means precisely to bring one's own preconcepts into play so that the meaning of the text can really be made to speak for us'.[178] For Gadamer, 'a hermeneutical situation is determined by the prejudices that we bring with us. […] [T]hey represent that beyond which it is impossible to see'.[179]

These brief quotations must suffice to show that Kischel's appreciation of hermeneutics differs in crucial respects from Gadamer's. Such variation is obviously not inherently problematic since no one is suggesting that Gadamer happens to be in possession of the final word on hermeneutics. At the very least, however, it is clear that there obtains more than one version of hermeneutics, Gadamer's, again, having established itself as the most authoritative model on offer.[180] It is Kischel's privilege to dispute Gadamer's insights, and I do not wish to deny him this entitlement for a moment. But it is incumbent upon any serious treatment of hermeneutics to address the foremost discussion of the subject-matter that has informed the scholarly conversation for more than a half-century. And it behoves one openly to position oneself vis-à-vis the principal theoretical framework to have been deployed. If Kischel's readership is requested to take the hermeneutic 'turn', so to speak, it can legitimately expect that this invitation be launched on the basis of a worthy exploration of the topic. And this is why it would also have been very helpful if Kischel had managed references to readily accessible monographs or collections of essays having specifically to do with law and hermeneutics, of which I easily count a good half-dozen, all of them absent from *Comparative Law*.[181] In particular, I cannot help but mention that as

[175] Gadamer, H-G *Wahrheit und Methode* supra note 169 at 302 ['*man* anders *versteht,* wenn man überhaupt versteht'].

[176] Gadamer, H-G (1986 [1961]) 'Zur Problematik des Selbstverständnisses' in *Gesammelte Werke* vol II Mohr Siebeck at 121 ['*Verstehen ist keine bloße Reproduktion einer Erkenntnis*'].

[177] Supra text at note 155.

[178] Gadamer, H-G *Wahrheit und Methode* supra note 169 at 401 ['*(d)ie eigenen Begriffe bei der Auslegung vermeiden zu wollen, ist nicht nur unmöglich, sondern offenbarer Widersinn. Auslegen heißt gerade, die eigenen Vorbegriffe mit ins Spiel bringen, damit die Meinung des Textes für uns wirklich zum Sprechen gebracht wird*'].

[179] Id at 298 ['*(d)ie Antizipation von Sinn, die unser Verständnis eines Textes leitet, (…) bestimmt sich aus der Gemeinsamkeit, die uns mit der Überlieferung verbindet*'].

[180] Eg: Warnke, G (ed) (2016) *Inheriting Gadamer* Edinburgh University Press; Malpas, J & Zabala, S (eds) (2010) *Consequences of Hermeneutics: Fifty Years After Gadamer's Truth and Method* Northwestern University Press; Krajewski, B (ed) (2004) *Gadamer's Repercussions* University of California Press; Malpas, J, Arnswald, U & Kertscher, J (eds) (2002) *Gadamer's Century* MIT Press; Hahn, LE (ed) (1996) *The Philosophy of Hans-Georg Gadamer* Open Court. Out of a plethoric bibliography, I limit this list to recent and noteworthy collections of essays in English.

[181] Eg: Glanert, S & Girard, F (eds) (2017) *Law's Hermeneutics: Other Investigations* Routledge; Leyh, G (ed) (1992) *Legal Hermeneutics* University of California Press; Mootz, FJ (ed) (2007) *Gadamer and Law* Routledge; Mootz, FJ (2016 [2010]) *Law, Hermeneutics and Rhetoric* Routledge; Senn, M & Fritschi, B (eds) (2009) *Rechtswissenschaft und Hermeneutik* Steiner; Kaspers, J (2014) *Philosophie — Hermeneutik — Jurisprudenz: Die Bedeutung der philosophischen Hermeneutik Hans-Georg Gadamers für die Rechtswissenschaften* Duncker & Humblot; Levinson, S & Mailloux, S (eds) (1988) *Interpreting Law & Literature: A Hermeneutic Reader* Northwestern University Press. In addition to these monographs, there exists a profusion of articles on hermeneutics and law. And then, there are the book chapters. For instance, Jens Zimmermann's *Very Short Introduction* to hermeneutics features an instalment on law. (I mean *even* Zimmermann's *Very Short Introduction* to hermeneutics...). See Zimmermann, J (2015) *Hermeneutics: A Very Short Introduction* Oxford University Press at 98-115.

early as 1986 — more than thirty years ago — Peter Goodrich was writing over forty pages on legal hermeneutics (making due reference to Gadamer) in his path-breaking *Reading the Law*, now a critical 'classic'.[182] *Why not engage? Can none of these many texts contribute the slightest insight?*

I must adduce one final set of observations as regards Kischel's suggested hermeneutic orientation for comparative law, which once more pertains to creditability. In 2009, Richard Hyland advocated, forcefully and thoughtfully, the displacement of functionalism in favour of an 'interpretive approach' to inform comparative law.[183] Observing that '[t]he law [...] is enmeshed in the web of understanding of which it is a part',[184] emphasizing the need 'to consider the law not only as a normative force but also as a cultural manifestation',[185] drawing largely on anthropologist Clifford Geertz,[186] Hyland maintains, in particular, that 'the interpretive method [...] refocuses attention on the law' in the richest sense of the term.[187] With specific reference to gifts, the theme of his extensive study, Hyland thus contends that '[the interpretive method] recommends that we think of gift law in the context of the world that jurists imagine for its operation, the purposes gift norms are designed to achieve, and the effects these norms are imagined to have'.[188] Given Hyland's express insistence on interpretation, method, and context, I cannot understand why Kischel refuses to take any notice — unless, of course, he does not know of Hyland's work, which would raise a problematic issue of its own.

I have indicated that before he develops his method, I understand Kischel to have to make two preliminary moves, the first one concerning hermeneutics. By way of a second motion, he requires to confiscate 'legal culture' from the comparatist's tool-box so that he can substitute 'legal context', the concept that sits at the heart of his comparative framework. Before addressing Kischel's theory and its prioritization of 'context', though, I find it important to dwell on *Comparative Law*'s nine-page dismissal of legal culture.[189]

My initial reaction to Kischel's discussion, a discomfiting experience that I regularly encountered as I read his book, is that I cannot begin to make sense of his references. Strangely, it seems to me, one is treated over two full pages — almost twenty-five percent of the entire segment — to the fine soporific points of an analytical debate between two sociologists of law that took place more than twenty years ago. If Kischel had determined to make 'legal culture' unattractive to his readership, he could hardly have done a better job of his dissuasion strategy. Contrariwise, there is no consideration — and, presumably, no awareness — of Paul Kahn's lively *The Cultural Study of Law* or of Lawrence Rosen's seductive, self-styled 'invitation' to *Law As Culture*.[190] And there is no exposition either

[182] Goodrich, P (1986) *Reading the Law* Blackwell at 126-67.
[183] See Hyland, R *Gifts* supra note 92 at 98-113.
[184] Id at 103.
[185] Id at 104.
[186] See Id at 106-09.
[187] Id at 106.
[188] Ibid.
[189] See Id at 212-20.
[190] Kahn, PW (1999) *The Cultural Study of Law* University of Chicago Press; Rosen, L (2006) *Law As Culture* Princeton University Press.

of Naomi Mezey's writing,[191] of Gary Watt's thinking,[192] of Jeffrey Leonard's views,[193] of Robert Post's perspective,[194] of Austin Sarat's reflections,[195] of David Nelken's recent scholarship,[196] or, to focus on the 'hard law' dear to Kischel's heart, on Boris Kozolchyk's work on commercial contracts.[197] Apart from Nelken, whom he mentions with respect to publications from more than ten years ago,[198] I suspect that Kischel has not heard of many of these names. (Meanwhile, if slightly later in the book, anglophone readers are treated to three citations to three texts on legal culture published in German and in Germany by German writers![199]) Needless to add, there is not the slightest reference to literary criticism, anthropology, sociology, science studies, or neurology — all fields where culture features prominently and generates intricate scholarship.[200] Can comparatists-at-law not learn *anything* from these other disciplinary perspectives?[201]

Be that as it all may, the abiding difficulty from Kischel's perspective is clearly the lack of scientificity, as he sees it, that befalls the notion of 'culture'. As I read Kischel, the fact that there is no 'clear picture or definition of legal culture',[202] that there are 'problems in finding an exact definition',[203] is definitely a major operational liability. More or less in desperation, I think, Kischel concludes that 'legal culture is not a theoretical concept laden with significance, but simply a conceptual catch-all for many diverse phenomena'.[204] According to Kischel, '[t]he comparative lawyer will always refer to legal culture when he is talking about something other than legal doctrine' — which suggests, no matter how preposterous the thought, that legal doctrine would somehow exist apart from culture, that legal doctrine would somehow dwell beyond culture.[205] For Kischel, indeed, culture

[191] Mezey, N (2001) 'Law As Culture' (13) *Yale Journal of Law & the Humanities* 35.

[192] Watt, G (2012) '"Comparison As Deep Appreciation"' in Monateri, PG (ed) *Methods of Comparative Law* Elgar at 82-103.

[193] Leonard, JD (ed) (1995) *Legal Studies As Cultural Studies* State University of New York Press.

[194] Post, R (ed) (1991) *Law and the Order of Culture* University of California Press.

[195] Sarat, A & Simon, J (eds) (2003) *Cultural Analysis, Cultural Studies, and the Law* Duke University Press.

[196] Eg: Nelken, D (2016) 'Comparative Legal Research and Legal Culture: Facts, Approaches, and Values' (12) *Annual Review of Law & Social Science* 45.

[197] Kozolchyk, B (2018) *Comparative Commercial Contracts: Law, Culture and Economic Development* (2nd ed) West.

[198] See Kischel, U *Comparative Law* supra note 1 at 212-13.

[199] See Id at 182 n 354.

[200] Eg: Chemla, K & Fox Keller, E (eds) (2017) *Cultures Without Culturalism: The Making of Scientific Knowledge* Duke University Press; Eagleton, T (2014) *Culture* Yale University Press; Lende, DH & Downey, G (eds) (2012) *The Encultured Brain* MIT Press; Wexler, BE (2006) *Brain and Culture* MIT Press; Richerson, PJ & Boyd, R (2005) *Not by Genes Alone* University of Chicago Press; Shweder, RA, Minow, M & Markus, HR (eds) (2002) *Engaging Cultural Differences* Sage; Kuper, A (1999) *Culture* Harvard University Press; Budick, S & Iser, W (eds) (1996) *The Translatability of Cultures* Stanford University Press; Bohannan, P (1995) *How Culture Works* Free Press; Bhabha, HK (1994) *The Location of Culture* Routledge; Geertz, C (1993) *The Interpretation of Cultures* Basic Books; Schneider, MA (1993) *Culture and Enchantment* University of Chicago Press; Clifford, J & Marcus, GE (eds) (1986) *Writing Culture: The Poetics and Politics of Ethnography* University of California Press; Geertz, C (1983) 'Local Knowledge: Fact and Law in Comparative Perspective' in *Local Knowledge* Basic Books at 167-234; Wagner, R (1981) *The Invention of Culture* University of Chicago Press.

[201] For a compelling argument in favour of comparative law's interdisciplinarity — or, rather more sophisticatedly, comparative law's 'indiscipline' — see Mercescu, A (2018) *Pour une comparaison des droits indisciplinée* Helbing & Lichtenhahn. For interesting insights, see also Foster, NHD, Mocati, MF & Palmer, M (eds) (2016) *Interdisciplinary Study and Comparative Law* Wildy, Simmons & Hill.

[202] Kischel, U *Comparative Law* supra note 1 at 212.

[203] Id at 213.

[204] Id at 218.

[205] Ibid.

must be confined to the 'extra-legal' realm.[206] It stands 'distinct from black letter law'.[207] On the one side, there are 'legal questions' and the 'normativ[e]'; on the other, there is 'legal culture' and, well, the wishy-washy.[208] Ultimately, for Kischel the difficulty is that legal culture has come to comparative law from a disciplinary elsewhere: it is 'heavily burdened by its origin in legal sociology'.[209] And one remembers how Kischel holds that 'comparative law is far removed from [...] legal sociology'.[210] Still, confusion lingers, because Kischel also writes, as one recalls, that '[t]he question of how much [...] comparative law can or should learn from legal sociology remains unresolved'.[211] Alas, Kischel's position is unclear.

It is perhaps Kischel's intellectual disarray, tinged with a good measure of the colonialism that tarnishes much of the book, that leads to the drafting of such a convoluted passage as the following: 'Those who believe in human rights and democracy must express their convictions clearly, and in particular must not shrink from proclaiming the ethical superiority of [Western and individualistic values, of] this and only this model of society above all others. [...] The principle of equality between men and women [...] may not be recognized everywhere as a cultural matter, but must be implemented everywhere regardless. This will not destroy any cultures. It will, however, endanger established — but illegitimate — forms of rule'.[212] (I say 'convoluted', and I do so advisedly. But I could also follow Frankenberg and write 'scary',[213] because it is indeed frightening to read, *in a comparative law text*, of 'the ethical superiority of [Western (...) values]' and of how the '[Western] model of society' would stand 'above all others'.) *Quaere*: Is Kischel saying that the Islamic prescription to the effect that a fifteen-year old woman must wear a *hijab* an 'established — but illegitimate — for[m] of rule'? And is it the case that because this direction would offend against '[t]he principle of equality between men and women' as understood within 'th[e] [Western] model of society', the 'ethical[ly] superio[r]' one, that this model 'must be implemented [...] regardless', and that France, for example, can therefore properly ban *hijab*-wearing women from public schools without further ado?[214] Is Kischel saying that the enforcement of this prohibition against the women's will is not going to have any destructive cultural effect? As one takes stock of Kischel's drivel, one may be forgiven for thinking that one is reading a journalist's transcript of some *Stammtischgespräch*.

Call me a cultural relativist (or — why not? — a cultural vandal determined to destroy Western values), but I completely fail to see on what basis, except encultured personal

[206] Id at 211.
[207] Id at 212.
[208] Id at 218.
[209] Id at 220.
[210] Id at 17.
[211] Supra note 66.
[212] Kischel, U *Comparative Law* supra note 1 at 41.
[213] Supra text at note 9.
[214] For the French 2004 enactment, see Statute no 2004-228 of 15 March 2004 enframing, in application of the principle of laicity, the wearing of signs or attire demonstrating a religious belonging in public primary and secondary schools ['*Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*'], https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977&fastPos=2&fastReqId=57586272&categorieLien=cid&oldAction=rechTexte, Art. 1: 'In public primary and secondary schools, the wearing of signs or attire whereby students conspicuously demonstrate a religious belonging is prohibited' ['*Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit*'] (on file).

inclination, Kischel is legitimating one meaning over all others — why he would regard the French legislative resolution as such an obviously 'superio[r]' answer — without being at all troubled by the institutional base (a coercive statute) out of which this particular meaning is being forcibly applied. Is there no interpretive room at all for the possibility that the French legal order is being unjust vis-à-vis Muslim women? Is it not at all conceivable that the comparatist-at-law might be precisely the kind of individual whose experienced voice ought to be raised in defence of women's rights? Rather than the passive role to which Kischel would seemingly confine him, is it not the comparatist-at-law's task to pursue a rigorously interrogative approach holding France accountable for the way in which it is organizing the social space in public schools? And if 'experience' is to mean anything within comparative analysis, as Kischel suggests it must, what about the 'experience' of oppression and exploitation that the woman is suffering as she sees French law obsessively repressing the affirmation of cultural meaningfulness that she brings forth on account of the dictates of her faith? Is Kischel's tenuous articulation of the salient issues, is the morigerous acceptance of the legal order in force to which he conveys the comparatist, are these responses adequate to the comparative sensitivity that must pertain to the antagonism that I discuss? Does *Comparative Law* have to be so dogmatically ruly? And does it have to adopt such a quietist line? Could it be that in his keenness to dismiss culture, Kischel is falling prey to cultural imperialism?

Kischel's bafflement with respect to culture, however, is plausibly most apparent as he discusses, if briefly, so-called 'legal transplants',[215] the significance of the topic justifying, I find, not only a mention on my part but also a reaction. Now, an account of my published objection to the very feasibility of a 'legal transplant' is crafted in the following terms in a 2013 collection of essays: 'In opposition to both functionalism and instrumentalism, Legrand represents what can be called a culturalist approach to legal transplants'.[216] I regard this designation as fair. How well, then, does Kischel understand my 'culturalist' stance? Or, to frame the matter somewhat differently, how sensitive is he to the cultural argument? Having considered my view that no law can travel across cultural lines without undergoing a transformation in the process (at times a legally and politically significant alteration) and my further claim that, properly speaking, the necessary acculturating swerve means that no 'transplant' can therefore take place, suffice it to say, for present purposes, that Kischel discards this position as 'absurd', a word that he lifts from another publication and, without the least leggiadrous proclivity, recycles with patently emulative glee.[217] This contemptuous riposte to my culturalist claim stands in very stark contrast indeed to so many other responses that readily appreciate how no cross-cultural reinscription — no translation — can abide an identificatory logic. There are heterogeneous or differential singularities, not homogeneous or interchangeable identities. There are multiple worlds, and there are multiple law-worlds. And although I have not been cataloguing the works that I have encountered acknowledging every legal deterritorialization to involve, in its displacement and in its becoming, a trajectory of

[215] See Kischel, U Com*parative Law* supra note 1 at 59-63.

[216] Michaels, R (2013) '"One Size Can Fit All" — Some Heretical Thoughts on the Mass Production of Legal Transplants' in Frankenberg, G (ed) *Order from Transfer* Elgar at 64. Michaels's reference is to Legrand, P (1997) 'The Impossibility of "Legal Transplants"' (4) *Maastricht Journal of European & Comparative Law* 111.

[217] Kischel, U Com*parative Law* supra note 1 at 63 n 71.

contingent and transient local assemblages, it is easy for me to identify a representative sample of the relevant enunciations. Embarrassing really, but needs must.

For instance, Günter Frankenberg describes my argument as '[q]uite persuasiv[e]'.[218] More or less at the other end of the theoretical spectrum within comparative law, Ralf Michaels opines that 'Legrand's thesis is sometimes viewed as exaggerated but generally sound, at least among comparative lawyers'.[219] Meanwhile, Gary Watt observes that 'Legrand is technically right to say that transplant is impossible'.[220] For his part, Sujit Choudhry remarks that '[w]hat Legrand has accomplished is to illustrate the inaptness of the legal transplant metaphor'.[221] And Pip Nicholson notes that '[t]ransplant theorists from the "law in context" tradition such as Legrand rightly believe that [Alan] Watson "pay[s] undue attention to the texts of written language to the detriment of the framework of intangibles within which interpretive communities operate. As a corrective, their highly nuanced studies locate legal rules in a cognitive framework that emphasises the linkages between legal transfers and underlying social values and practices'.[222] In the detailed analysis that he devotes to the matter, Michele Graziadei holds that 'there is some truth in Legrand's claim that "the transplant" cannot survive the change of context unscathed'.[223] Even according to Annelise Riles — despite, then, her derogatory asides about me (resting, as it happens, on unverified and demonstrably erroneous suppositions) — 'Legrand's thesis adds a number of sophisticated angles to comparative legal theory', at least '[i]n its less dogmatic versions'.[224]

It ought to go without saying, by now, that Kischel does not mention any of these scholarly texts. Again, I am confident that I could find other work along analogous lines that Kischel has also ignored,[225] but the present enumeration serves well enough for me to support my contention — which is that these seven essays collectively establish, at the very bare minimum, at the '[m]eremost minimum' (to say it like Beckett),[226] that *my argument is not absurd*, whatever else it may be. If it were absurd, not only would the seven comparatists that I indicate not have written as they did, but my text would not have been re-issued with corrections in a co-edited collection of essays, reprinted in two anthologies, and translated in four languages. (I deliberately omit relevant references so as not to belabour the point, but I am happy to make them available.) And my argument would not

[218] Frankenberg, G (2013) 'Constitutions As Commodities: Notes on a Theory of Transfer' in Frankenberg, G (ed) *Order from Transfer* Elgar at 6.

[219] Michaels, R '"One Size Can Fit All" — Some Heretical Thoughts on the Mass Production of Legal Transplants' supra note 216 at 65.

[220] Watt, G '"Comparison As Deep Appreciation"' supra note 192 at 93.

[221] Choudhry, S (2006) 'Migration As a New Metaphor in Comparative Constitutional Law' in Choudhry, S (ed) *The Migration of Constitutional Ideas* Cambridge University Press at 19.

[222] Nicholson, P (2008) 'Legal Culture "Repacked": Drug Trials in Vietnam' in Nicholson, P & Biddulph, S (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* Nijhoff at 55-56. The late Alan Watson was, of course, the focus of my counter-argument. Nicholson's quotation is from Legrand, P 'The Impossibility of "Legal Transplants"' supra note 216 at 121.

[223] Graziadei, M (2019) 'Comparative Law, Transplants, and Receptions' in Reimann, M & Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* (2nd ed) Oxford University Press at 469.

[224] Riles, A (2019) 'Comparative Law and Socio-Legal Studies' in Reimann, M & Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* (2nd ed) Oxford University Press at 792 & 791-92.

[225] For an express acknowledgment that 'legal transplants' are *impossible*, see Geiringer, C (2019) 'When Constitutional Theories Migrate' (76) *American Journal of Comparative Law* 281.

[226] Beckett, S (2009 [1983]) *Worstward Ho* in *Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still* Van Hulle, D (ed) Faber & Faber at 82.

be studied in Brazil and Singapore, in Romania and in Finland, as I know this to be the case as a matter of fact. How, then, to account for Kischel's absurd choice of word? The most charitable interpretation that I can muster suggests that Kischel does not understand the culturalist argument, that he is unable to appreciate how culture works in the law. When he states my concern to be 'how and to what extent legal rules are changed by transplantation',[227] this oxymoronic formulation starkly reveals his bemusing deficiency.[228]

[227] Kischel, U *Comparative Law* supra note 1 at 63.

[228] To be fair, fallaciousness is not Kischel's prerogative. Consider Harding, A (2019) 'The Legal Transplants Debate: Getting Beyond the Impasse?' in Breda, V (ed) *Legal Transplants in East Asia and Oceania* Cambridge University Press at 13-33. Taking stock of the way in which academic fields in the law have coalesced at this writing, I assume there can be broad agreement to the effect that the subject-matter of so-called 'legal transplants' appropriately pertains primarily to comparative law and that discussions with respect to this issue aptly fall primordially within the province of comparative-law scholarship. To formulate this point in slightly different (and ampliative) language, I think that it is a fairly consensual claim to make that the diffusion of ideas across legal borders — laws' traffic — is a comparative topic *par excellence* and that comparatists-at-law ought to be optimally equipped to address the relevant issues with meaningful insight. One therefore readily assumes that what pertinent debates will arise on the theme of so-called 'legal transplants' will spontaneously take place amongst comparatists-at-law. No one familiar with the exchange of views that took place between Alan Watson and me in the late 1990s — and this must mean, albeit in advance of empirical study, every comparatist-at-law or so — would have been at all surprised therefore that the issues would have attracted the attention of two comparatists-at-law. Lo and behold, Professor Andrew Harding is at harrumphing pains to let his readers know that if they ever formed such impressions, they have been labouring under grievous mistakes. No: the disputation on 'legal transplants' did not happen within comparative law, and it did not involve two comparatists-at-law. Embracing an age-old motion that consists in discrediting the individuals whose work one wants to challenge — in other words, succumbing to the oh-so-facile *ad hominem* attack — Harding is keen, very early in his argument, to establish that, in effect, the protagonists in the so-called 'legal-transplants' debate do not qualify as *bona fide* comparatists-at-law. One (Watson) is but 'a legal historian': Id at 14. The other (me!) is 'a legal theorist with an interest in comparative law': Ibid. I am happy to leave it to John Cairns to redeem Watson's comparative credentials — which, frankly, I cannot see any comparatist-at-law challenging with the slightest earnestness. For my part, I read the indication that my competence in comparative law would extend only to the expression of an 'interest' as an outright attempt to discredit me and to disparage my *Maastricht* paper (see Legrand, P 'The Impossibility of "Legal Transplants"' supra note 216). (In passing, I must confess to a good measure of astonishment at Harding's characterization of me, and I am moved to ask: *how much* must one do for one to be deemed to rank as a comparatist-at-law? *How much* must one write in the *Journal of Comparative Law?*) Again, eliminativist tactics are all too habitual. Consider the belittling work that the words 'an interest in comparative law' are meant to do. Harding's ambition is to deprive my argument as regards so-called 'legal transplants' of an entitlement to respect, to cancel any warrant that my contention might be minded to claim from the institutional authority typically vested in specialization or expertise. Indeed, if I do not qualify as a *bona fide* comparatist, if I am not professionally conversant with the subject-matter of comparative law, if I am coming to the comparison of laws as an amateur, as a dilettante, my thoughts hardly deserve sustained attention and certainly do not justify the persistent consideration that they have been attracting for a quarter-of-a-century or so in a half-dozen languages. While Harding recognizes my text's standing within comparative law, he expressly bemoans the fact of its visibility: see Harding, A 'The Legal Transplants Debate: Getting Beyond the Impasse?' supra at 13. Harding's ambition in his book chapter is thus to disqualify me at the outset; when it comes to so-called 'legal transplants', I would simply not prove a worthy scholarly interlocutor. Of course, it is not enough for Harding to dismiss Watson and me on account of our charlatanry. In addition, he requires to establish his own credentials as comparatist-at-law, which he does (somewhat cursorily, in my view) by describing himself as 'a teacher who has taught classes on legal transplants for many years': Id at 15. In his impetuosity to castigate Watson and me as mere pretenders and in his further haste to thrust himself forward as someone deserving to be designated as a genuine comparatist-at-law, Harding fails to appreciate that I, too, may well have been teaching 'classes on legal transplants for many years' (if I may be allowed to respond to Harding's argument at its own level of unsophistication). Has Harding not bothered to research the matter before drawing the condemnatory distinction that he inscribes in his essay? Facts, please! At this writing, I teach at the minimum twelve courses in six law schools on three continents in every academic year. Often, I teach one or two additional courses in a given academic year in yet more law schools on yet more continents. All of these courses, bar none, are on comparative law ('interest', indeed!). And, at this writing, I have been following this pedagogical pattern for twenty years or so. All in all, my tally represents a not inconsiderable number of courses

Having promoted his peculiar version of the hermeneutic approach and demoted (if wholly unconvincingly) the idea of 'culture', Kischel finds himself able to develop his alternative theoretical model, which revolves around the notion of 'context'. In this regard, he is adamant: 'Context, Not Culture'.[229] With respect to hermeneutics, it will be recalled

in comparative law. Is it not conceivable that I, too, in one or other of these numerous courses, may well have been teaching 'classes on legal transplants' and that I may perhaps have been doing so 'for many years'? In effect, Harding, once more in predictable fashion, is attempting to construct his professional identity on the mode of the 'they'/'I'. Indeed, the fashioning of an 'I' requires as its very condition of possibility the demarcation of a 'they'. Along the way, pluralism must be excluded: there will be no room for different comparatists or for different comparatisms. What must prevail is monody — Harding's monody. In effect, Harding's position is hegemonic, and it features a crude exercise in epistemic power, an application of sheer epistemic violence, indeed a deployment of epistemicide, the main goal being to annihilate Watson's comparative credentials, to kill my standing as a comparatist-at-law. Harding's stance is also exceedingly formalist, although he does not tell his readership about the criteria making it possible for him so readily to count as a comparatist-at-law while Watson and me patently fail to make the grade (surely, it cannot be the teaching of 'classes on legal transplants for many years'...). In effect, Watson and I are serving as Harding's 'other', thus allowing him to assert himself through a two-pronged strategy of 'differentiation from' and 'exclusion of'. Even ignoring Harding's emphatic excommunications that would permit him to appear as the last man standing, I hold that the argument on offer was left quite some distance from fruition: the fragile rhetorical scaffolding on display is indeed marred by sustained reductionism and confusion, substantial simplism, and distortion. It is the late historian Norman Stone who once said: '[C]an I have a challenger who can read?': Stone, N (28 May 1993) [Letters to the Editor] *The Times Literary Supplement* at 17. Indeed, I am led to remark that although there is dabbling in comparative law in the book chapter at hand, it is not to be found where Harding has sought to locate it. But I want to refrain from wielding the *tu quoque* argument. Suffice it to restate Watson's claim, then, and to do so as concisely as I can, and to reformulate my retort, again as economically as possible (with heartfelt thanks to Bruno Latour). To illustrate his doctrine of 'legal transplants', Watson holds that 'Visigothic Spain, parts of post-mediaeval Germany and nineteenth century California could accept for a variety of reasons what is basically the same régime of matrimonial property': Watson, A (2001) *Society and Legal Change* (2nd ed) Temple University Press at 110. In response, Lawrence Friedman observes that 'these premises are ludicrous, to put it bluntly': Friedman, L (2001) 'Some Comments on Cotterrell and Legal Transplants' in Nelken, D & Feest, J (eds) *Adapting Legal Cultures* Hart at 93. Friedman also contends that 'in some way attacking Watson is like shooting fish in a barrel': Ibid. Friedman is right, of course. For my part, I use different language, and I maintain that the word 'transplant' and its connotations assume the transfer of an invariant (say, a plant or a liver). However, law is not an invariant, and it can never be an invariant because it is not structured in a way that can ever allow it to exist as an invariant. It follows that when it comes to law, there can be 'no transportation without transformation': Latour, B (1992) *Aramis ou l'amour des techniques* La Découverte at 104 ['*pas de transport sans transformation*']. Whatever happened across 'Visigothic Spain, parts of post-mediaeval Germany and nineteenth century California' (to quote Watson) cannot, by any means, properly be called a 'legal transplant'. What will have taken place, rather, is a process dissemination or diffusion — and certainly not a 'transplant'. For his part, Sujit Choudhry refers to 'migration'. Eg: Choudhry, S 'Migration As a New Metaphor in Comparative Constitutional Law' supra note 221 at 1-35. The difficulty with 'migration', however, is that it can address a temporary phenomenon involving a shuttle between base and destination (consider storks and other migratory birds). Along the way, one is usefully reminded of how path-dependence can make for a blinkered view. For a most fanciful contention to the effect that the expression 'legal transplant' is 'easy and useful', 'helpful', and 'brings with it a rich history that is thoughtful about methodology' (Watson, Alan Watson, 'thoughtful about methodology'?), see Goldbach, TS (2019) 'Why Legal Transplants?' (15) *Annual Review of Law & Social Science* 583 at 584, 596 & 596. While this author holds that '[i]t is time for this debate to be put to rest' (Id at 593), her bewildering claims in favour of the perpetuation of a decisively flawed terminology (and of a host of decisively flawed implications) will no doubt reveal her presumption 'to declare winners and losers' to have been very premature, if nothing else: Id at 584. To return to Harding a final time, may I be allowed to enter one more remark? In his bibliography, Harding attributes two publications to me (see Harding, A 'The Legal Transplants Debate: Getting Beyond the Impasse?' supra at 32). But one of them is not by me at all. It was written by Alan Watson. Frankly, *ce n'est pas sérieux*.

[229] Kischel, U *Comparative Law* supra note 1 at 220. Even if this injunction is suitably crisp, so to speak, it is difficult to reconcile with other enunciations elsewhere in *Comparative Law* that very much appear as contradictory enactments. For example, Kischel also writes that [i]n any event, the solution favored by one particular nation must be viewed in the context of its legal system and legal culture': Id at 6. And, he argues, 'the comparative lawyer must recognize a norm's conceptual, systematic, and cultural context': Id at 173. Kischel states, too, that '[t]he context which should be considered is not limited to legal doctrine, but also extends to

that Kischel observes how 'the object of study is to be understood on its own terms in its respective context' and how, even as regards 'better-law' comparison, the comparatist must bring to bear a 'contextual understanding'.[230] 'Context' is therefore Kischel's key keyword; indeed, by my count, there are at least twenty-seven occurrences of the term in the book's table of contents alone.[231]

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In *Comparative Law*, the central section on the implementation of 'context' covers almost thirty pages.[232] Before all else, let me observe that for Kischel, crucially, 'context is composed both of legal and non-legal elements'.[233] It follows that 'working with context requires us to take into account the entire legal and non-legal environment in which every legal rule exists'.[234] At the outset, Kischel proclaims that '[t]he core of comparative law is [...] always the understanding of context: it is *contextual comparative law*'.[235] And, he says, 'contextual comparative law should be expressly understood as a hermeneutical method'.[236] While 'contextual comparative law' is open to 'the consideration of as many relevant legal and non-legal factors and insights as possible in every individual study',[237] '[i]t is not suited to providing general instructions for "correct" comparative law in the manner of a recipe'.[238] For Kischel, '[t]he method is based on experience'.[239] However, Kischel remains keen to eschew 'mistaken' comparative law to the point where he supplies a fifteen-page list of what he regards as errors to be avoided — an enumeration that he entitles, oddly, 'A System of Mistakes in Comparative Law'.[240] (This peculiar allusion to systemics shows how law-as-science unmistakably casts a very long shadow.)

As one remembers that 'contextual comparative law' is meant to operate as functionalism by another name, one is not surprised to be warned against 'the danger of overlooking functional equivalents'.[241] Indeed, the comparatist applying 'contextual comparative law' must 'look for equivalent foreign rules',[242] a strategy, I assume, that connects with the need for '[r]elativizing [d]ifferences' — as, indeed, befits the functionalism that Zweigert and Kötz have made familiar.[243] Kischel completes his section on 'contextual comparative law' by discussing whether the comparative report should juxtapose or integrate the laws

legal culture': Id at 182. In these three instances, 'context' and 'culture' stand together rather than in opposition.

230 See also supra text at notes 151 & 164.

231 See at [xi]-xxviii.

232 See Id at 173-200.

233 Id at 222.

234 Id at 220-21. See also Id at 173: 'The basic idea is to take account of the legal and extra-legal environment in which every legal regulation operates'. Kischel reaffirms this imperative as he writes that a comparative study 'requires the legal and non-legal context to be comprehensively taken into account': Id at 189.

235 Id at 174.

236 Ibid. For Gadamer, such formulation consists, of course, in a contradiction in terms of the first magnitude. See supra text at notes 170 & 171.

237 Kischel, U *Comparative Law* supra note 1 at 174.

238 Ibid.

239 Ibid. Kischel's dynamics between 'method' and 'experience' is unpersuasive. For much the more sensible approach, see Derrida, J (2001) *Papier Machine* Galilée at 368: 'Experience is [...] the method' ['*L'expérience est (...) la méthode*'].

240 See Kischel, U *Comparative Law* supra note 1 at 174-88. The title is at Id at 174.

241 Id at 180. The German term is '*Äquivalente*': Kischel, U *Rechtsvergleichung* supra note 2 at 194.

242 Kischel, U *Comparative Law* supra note 1 at 180.

243 Ibid [emphasis omitted]. For Zweigert and Kötz, '[d]ifferences are in truth not relevant': Zweigert, K & Kötz, H *Einführung in die Rechtsvergleichung* supra note 116 at 60 ['*Unterschiede (sind) in Wahrheit nicht relevant*'].

being compared.[244] He also offers thoughts on the step-by-step production of a piece of comparative research.[245] In this respect, he addresses '[f]inding a topic';[246] preliminary reading, including materials on the theory and practice of comparative law (a comparatist, one is told, should 'not even begin researching a specific subject if he does not know what a functional equivalent is');[247] the study of foreign sources;[248] the 'detect[ion] [of] foreign equivalents';[249] the consideration of 'differences between law in books and law in action';[250] and the '[w]riting of a [f]irst [d]raft'.[251]

In response to Kischel's deployment of his 'contextual comparative law' — which, judging from the various passages that I have just quoted, appears to give pride of place to the idea of 'equivalence' — I want to enter six sets of observations.

First, it is important that Kischel's readers realize how the idea of 'law in context' is not new. It may have reached the gramadoelas of German legal culture only recently, but in 1970 — that is, fully a half-century ago — Patrick Atiyah, later to prove an innovative and influential chair of English law at Oxford, released his *Accidents, Compensation and the Law* as the first book in the 'Law in Context' series at Weidenfeld & Nicolson's.[252] And there are monographs advising in favour of contextualization with specific reference to comparative law.[253]

Secondly, Kischel's dynamics between 'context' and 'culture' is unclear. Specifically, there is express confusion as to whether the two ideas stand in opposition (as in 'Context, Not Culture')[254] — or not (as in 'cultural context').[255]

Thirdly, Kischel's dynamics between 'contextualism' and 'functionalism' is unclear. Kischel heaps obsequious praise on Zweigert and Kötz's functionalism,[256] says that 'contextualism' is very much functionalism by another name,[257] insists that contextualism will 'preserve the basic concern of the functional method',[258] and holds that '[t]his basic idea is to take account of *the legal and extra-legal environment in which every legal regulation operates*'.[259] But, it seems to me, Zweigert and Kötz's functionalism claims to do precisely the opposite. Here are their words (in my German-language-oriented translation): 'The solutions of the investigated legal orders are to be freed of all systematic concepts of these legal orders, to be unfastened out of their solely-national dogmatic incrustations'.[260] To

[244] See Kischel, U *Comparative Law* supra note 1 at 189-93.
[245] See Id at 195-200.
[246] See Id at 194-95. However, Kischel writes that '[t]here is [...] almost nothing that can generally be said about th[is] [...] question': Id at 194. I disagree, and I find that I always have profuse advice to offer my students as we meet in congenial Paris cafés to discuss their thesis or dissertation topic.
[247] See Id at 195-96. The quotation is at Id at 195.
[248] See Id at 196-98.
[249] Id at 199.
[250] Ibid.
[251] Id at 200.
[252] Atiyah, PS (1970) *Accidents, Compensation and the Law* Weidenfeld & Nicolson.
[253] Eg: Ross, S, Irving, H & Klug, H (2014) *Comparative Constitutional Law: A Contextual Approach* LexisNexis.
[254] Supra text at note 229.
[255] Kischel, U *Comparative Law* supra note 1 at 173.
[256] Supra text at note 88.
[257] See Kischel, U *Comparative Law* supra note 1 at 173.
[258] Ibid.
[259] Ibid [my emphasis].
[260] Zweigert, K & Kötz, H *Einführung in die Rechtsvergleichung* supra note 116 at 43 ['*Die Lösungen der untersuchten Rechtsordnungen sind von allen systematischen Begriffen dieser Rechtsordnungen zu befreien, aus ihren nur-nationalen dogmatischen Verkrustungen zu lösen*']. For Tony Weir's published (and English-language-oriented) translation,

frame the contrast between the two approaches, one could say that Kischel's purports to be centripetal while Zweigert and Kötz's is centrifugal. Why, then, Kischel appears so keen to applaud Zweigert and Kötz's model remains puzzling.

Fourthly, Kischel's dynamics between 'method' and 'hermeneutics' is unclear. Consider expressions like 'intuition honed by experience',[261] 'common sense',[262] 'keep[ing] [one's] eyes open',[263] and 'a dash of luck'.[264] These formulations all sit very well with 'hermeneutics', but they seem far more difficult to connect to the idea of 'method', even if one is prepared to adopt a very relaxed view of the methodological. After all, those who proceed to invest in method do so specifically in order to parry the import of such anti-scientific contingencies as 'common sense' or 'luck'.

Fifthly, Kischel insists on the need for the comparatist-at-law to concern himself with 'functional equivalence'. Indeed, Kischel writes that one should 'not even begin researching' foreign law 'if [one] does not know what a functional equivalent is'.[265] And when Kischel asserts that there is more to comparative research than functional equivalence, he is still indicating a focus on functional equivalence. Consider the passage where he is advocating a 'broad view': 'This broad view [...] goes far beyond merely seeking a foreign equivalent in the foreign legal order'.[266] In other terms, there is both the need to ascertain the 'foreign equivalent' and the further requirement to do more. Now, whatever perspective one takes on the matter of 'equivalence', and irrespective of how open-textured a stance one is prepared to adopt in this regard, I cannot see how the term can fail to evoke the ideas of 'sameness' or 'similarity' (as comparative law's orthodoxy habitually understands these words, that is, as somewhat loose declensions on the theme of 'identity'). Indeed, 'equivalence' inevitably gestures towards 'correspondence', 'correlation', or 'isomorphism'. I am confirmed in my understanding that Kischel holds likeness in especial esteem, so to speak, when he writes that while 'meaningful legal comparisons are not restricted to legal institutions which serve a single and uniform identifiable function', 'it is permissible — and common — simply to compare two given legal institutions perhaps because their similarity is evident for linguistic or historical reasons'.[267] It is not that Kischel does not mention differences across laws, for he does, repeatedly. But the gist of his message to the comparatist-at-law regarding differences appears to be the need 'to judge properly the magnitude of differences which have been found, in other words to relativize the differences'.[268] Bearing in mind that the very idea of 'equivalence' (as in 'functional equivalence') lies at the

see Zweigert, K & Kötz, H *Introduction to Comparative Law* supra note 116 at 44: '[T]he solutions [comparatists] find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones'.

261 Kischel, U *Comparative Law* supra note 1 at 174.

262 Ibid.

263 Id at 180.

264 Ibid.

265 Supra text at note 247. See also, eg, supra text at notes 241, 242 & 249.

266 Kischel, U *Comparative Law* supra note 1 at 180.

267 Id at 172.

268 Id at 180. The German term is '*Abweichungen*', which more justly translates as 'divergences': Kischel, U *Rechtsvergleichung* supra note 2 at 194. This quotation does not mean that Kischel accords differences no role whatsoever. For instance, he acknowledges that 'differences in legal cultures can also affect legal techniques and legal theory': Id at 183. Problematically, though, he also writes that legal culture is 'other than' legal doctrine: supra text at note 205. If one contends that X is other than Y and that X may yet affect Y, one needs to say more about the X-Y dynamics. But here, as elsewhere, Kischel's position remains unclear.

heart of the functional enterprise that Kischel so fervently wishes to retrieve, and taking into account Kischel's inclination to protect the '*præsumptio similitudinis*',[269] I hold that *Comparative Law*'s argument rests, heavily, disclaimers notwithstanding,[270] on the basic assumption that there somehow exists likeness across laws in advance of any comparison taking place and that an important task for comparatists is to identify such pre-existing likeness through the deployment of the optimal method (although Kischel also appears to find problematic 'the unconscious assumption that everything must be similar — that is, of course, similar to home', a lack of clarity that makes for yet more confusion).[271]

To be sure, Kischel is entitled to the view that likeness across laws exists *immer schon*, if you will, and to the further opinion that sound methodological work will allow the comparatist-at-law to elucidate such likeness. But he labours under a scholarly duty to defend this stance — which he does not do. As I read him, likeness across laws appears to pertain to the realm of incontrovertible givens. If this is indeed what Kischel thinks, I very much beg to differ. If I may be allowed a brief reference to Michel Foucault, one of the 'postmodernist' writers that Kischel so vehemently despises, consider this insightful claim: 'There is no resemblance without signature. The world of the similar can only be a marked world'.[272] Let me translate the frammis (not least for the benefit of Kischel who, I understand, is uncomfortable with what he calls 'big words' — an argument that it is hard to take seriously, coming from someone who is in the habit of writing in the German language).[273] Foucault's basic idea is that it does not inherently pertain to any entity (say, to any law) to be like another entity (say, another law). Far from constituting an essential characteristic, likeness is always attributed by an analyst or a commentator. Hence, Foucault's contention that there is 'no resemblance without signature', that every resemblance bears the signature of an analyst or of a commentator. This is the sense in which Foucault maintains that 'the world of the similar can only be a marked world', that every resemblance bears the mark of an analyst or of a commentator. Jacques Derrida — another of Kischel's many 'postmodernist' *bêtes noires*[274] — has an important deconstructive insight to offer on this issue. Seeking to probe the term 'resemblance' with a view to generating a heightened understanding of it, Derrida observes that '[t]he way in which resemblances constitute or stabilize themselves is relative, provisional, precarious'.[275] Indeed, if sameness is the product of an analyst's or of a commentator's interpretive input, one can expect an

[269] Strangely, Kischel suggests that '[t]he functional method is [...] neutral on the question of the *præsumptio similitudinis*': Id at 168. If functionalism is about the prioritization of equivalence, how can it be 'neutral' vis-à-vis the '*præsumptio*', which instructs one to anticipate a finding of equivalence? Are the two devices not operating in lockstep?

[270] Eg: Kischel, U (2016) 'Critical Legal Studies, Postmodernism and the Contextual Method in Comparative Law — A Reply to Günter Frankenberg' (76) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1009 at 1016: 'It sometimes seems as if it is not the mainstream that is obsessed with similarity, but some of their critics that are obsessed with difference'.

[271] Kischel, U *Comparative Law* supra note 1 at 48.

[272] Foucault, M (1966) *Les Mots et les choses* Gallimard at 41 ['*Il n'y a pas de ressemblance sans signature. Le monde du similaire ne peut être qu'un monde marqué*'].

[273] Kischel enunciated his reservation, I am reliably told, on the occasion of an intervention before the British Association of Comparative Law, at the University of Central Lancashire, in Preston, UK, on 3 September 2019. Although he did not mention his inspiration on that occasion, it is fair to say that he borrows the expression from Karl Popper. See Kischel, U *Comparative Law* supra note 1 at 97 n 58.

[274] See Id at 99.

[275] Derrida, J (2011 [1993]) *Politique et amitié* Sprinker, M (ed) Galilée at 112 ['*(l)a manière dont se constituent ou se stabilisent les ressemblances est relative, provisoire, précaire*'].

interpretation to depend on its interpreter (it is therefore relative to him), to be liable to amendment (it may well be modified as the interpreter changes his mind over time), and to be fragile (its success hinges on its reception by the interpreter's readers).

But let me return to Kischel's predilection for likeness. In reaction, my point is, simply, that likeness is not what is the case; rather, it is interpretively ascribed or assigned, always, inevitably — and any fashioning of likeness is therefore structurally indeterminate. If Kischel believes that comparatists-at-law must discern (or, rather, impute) likeness across laws, it is his prerogative so to hold. But, I contend, he must acknowledge his interpretive input, communicate the reasons underlying his preference, and tell his readership about the epistemic price that will have to be paid along the way — for there is no such thing as a free likeness. Surely, for example, a comparative law that is set on formulating likeness across laws will 'lose' an ability or a willingness to ascertain the singularity of any law vis-à-vis all other laws. In other terms, there will be 'singular' features of a law that will be overlooked with a view to emphasizing likeness across laws. Personally, I think that there are serious epistemic difficulties with such an approach to the point where I strongly advise my students not to adopt it, for it is exceedingly contrived and therefore distortive of the legal singularity as it exists that comparatists have to convey with full integrity as a matter of justice. The ambition of comparative law must not be to reach a consensus across laws, but to allow the comparatist to make sense of the dissensus through an agonistic — that is, an adversarial — staging. It is the incessant negotiation and renegotiation of this tension that makes comparison epistemically worthwhile.

Meanwhile, Kischel's fixation on likeness prompts him to overlook the fact that a similarity effectively heralds a difference, a small one perhaps, rather than the equivalence that he unabashedly takes it to mean. Consider Bergson: 'In a sense, nothing resembles anything since all objects differ'.[276] Unsurprisingly, Nelson Goodman, a conscientious philosophical investigator, concludes that '[s]imilarity [...] is a pretender, an impostor, a quack'.[277] As he draws attention to semblance's 'insidious' character,[278] Goodman contends that all attempts to explain the world by way of 'similarity' must be abysmally deficient. Similarity is 'an empty [...] relation'.[279] Goodman thus chastises the prevailing 'addiction to similarity'[280] — for instance, the fact that '[h]istorically [...] comparative frameworks have been directed toward gaining an understanding of similarities', that 'similarities have guided [comparative] inquiries, explicitly or implicitly'.[281] Along with Foucault's, Derrida's, and Bergson's, Goodman's intuition is sound, and terms like 'similarity' and 'sameness' prove misleading.

To maintain that entity A (say, US judicial review) is similar to entity B or is the same as entity B (say, the Mexican *amparo*) — in brief, that it is equivalent to entity B — must mean, on every occasion, that entity A effectively differs from entity B, that it is singular vis-à-vis entity B. *This is what is the case*. Remember Leibniz, an analytical philosopher *avant la lettre*,

[276] Bergson, H (2013 [1934]) *La Pensée et le mouvant* Presses universitaires de France at 56 ['*En un sens, rien ne ressemble à rien, puisque tous les objets diffèrent*'].
[277] Goodman, N (1972) *Problems and Projects* Hackett at 437.
[278] Ibid.
[279] Id at 443.
[280] Id at 438.
[281] Yengoyan, AA (2006) 'Comparison and Its Discontents' in Yengoyan, AA (ed) *Modes of Comparison* University of Michigan Press at 144.

and envisage what has been styled 'Leibniz's Law',[282] an enunciation that I am minded to rephrase thus: if there is more than one in co-presence, there must be difference. To apply the proposition to law: if there is more than one law of error or more than one law of strict liability, there is difference between these laws of error or these laws of strict liability. *There is difference, and there must be: these laws of error or strict liability cannot not differ*.[283] Only if entity A were identical to entity B would it not differ from entity B. But the only way in which entity A could be identical to entity B would be for entity A to be entity B. However, if entity A were entity B, the very idea of a comparison featuring entities A and B would be non-sensical. I maintain that this logical demonstration is nothing short of decisive for comparative law and that only the ignorant or the duplicitous would dismiss it as sophistry. As Derrida exclaims: '[T]o compare[:] [t]here has to be a difference permitting it'.[284] Now, '[w]ithout acknowledging differences, comparison is partisanship, and not always in a good cause'.[285] Ultimately, though, it is Kischel's views that are the focus of my essay, and the gist of my claim is, once more, that he must justify, certainly much better than he has been willing to do, the position that he defends.

Sixthly (I am pursuing my six-prong list of remarks), Kischel's contextualism suffers from what I think are two disqualifying flaws. The initial difficulty — a major concern — has to do with Kischel's inability to distinguish clearly between what is within the sphere of the legal and what is not. Consider what Kischel variously styles 'the legal and non-legal *context*',[286] the 'legal and non-legal *environment*',[287] 'legal and non-legal *factors*',[288] 'legal and non-legal *elements*',[289] or 'legal and non-legal *aspects*'.[290] There is also a reference to 'the non-legal aspects of context'.[291] And Kischel mentions 'legal and non-legal *functional equivalents*'.[292] In addition, Kischel simultaneously refers to 'the legal and *extra-legal* context',[293] 'the legal and *extra-legal* environment',[294] '*extra-legal* factors',[295] 'factors of

[282] Eg: Leibniz, GW (1965 [1764†]) *Nouveaux essais sur l'entendement* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* Gerhardt, CJ (ed) vol V Olms at 49: '[B]y virtue of imperceptible variations, two individual things [...] must always differ' ['*(E)n vertu des variations insensibles, deux choses individuelles (...) doivent tousjours differer*']. See also, eg, Leibniz, GW (1965 [1686]), *Discours de métaphysique* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* Gerhardt, CJ (ed) vol IV Olms §XXIV at 449: 'When I can recognise a thing amongst the others, without being able to say in what consist its differences or properties, the knowledge is confused' ['*Quand je puis reconnoistre une chose parmy les autres, sans pouvoir dire en quoy consistent ses differences ou proprietés, la connoissance est confuse*'].

[283] Cf Milet, J (2006) *Ontologie de la différence* Beauchesne at 76: '[T]he differentiated, or the differential, is a given' ['*(L)e différencié, ou le différentiel, est une donnée*'].

[284] Derrida, J (1978) *La Vérité en peinture* Flammarion at 429 ['*(C)omparer(:) (e)ncore faut-il qu'une différence le permette*'].

[285] Moyn, S (19 May 2020) 'The Trouble with Comparisons' *NYR Daily* https://www.nybooks.com/daily/2020/05/ 19/the-trouble-with-comparisons/ [on file].

[286] Kischel, U *Comparative Law* supra note 1 at 189 [my emphasis].

[287] Id at 220 [my emphasis].

[288] Id at 174 [my emphasis]. See also Id at 167, where there is a reference to 'non-legal factors'.

[289] Id at 222 [my emphasis].

[290] Id at 199-200 [my emphasis].

[291] Id at 223.

[292] Id at 117 [my emphasis].

[293] Id at 208 & 211 [my emphasis]. See also Id at 200, where there is a mention of 'the legal or *extra-legal context*' [my emphasis].

[294] Id at 173 [my emphasis].

[295] Id at 7.

a legal and extra-legal *nature*',[296] 'legal and *extra-legal* aspects',[297] '*[e]xtra-[l]egal* [a]spects',[298] and 'extra-legal *mechanisms*'.[299] The confusion arising from such slapdashery appears beyond redemption. Even assuming, charitably, 'non-legal' and 'extra-legal' to operate as synonyms, how can 'context' also mean 'environment', 'factors', 'elements', 'aspects', 'functional equivalents', 'nature', and 'mechanisms'?

But the extension of the 'legal' (as opposed to what *Comparative Law* variously calls the 'non-legal' or the 'extra-legal') is not Kischel's only delineating predicament, for there is another problem involving the location of culture. While the formulation 'legal culture and non-legal factors' makes it unclear whether the terms 'legal culture' and 'non-legal factors' are being deployed disjunctively or not,[300] a further use of these designations expressly distinguishes between the two: there is 'legal culture' here, and there are 'non-legal factors' there.[301] But recall that for Kischel culture must be confined to the 'extra-legal' realm,[302] that it is 'distinct from black letter law'.[303] And then, there is a reference to the 'legal-cultural, and even extra-legal environment',[304] which appears to draw a line between the 'legal-cultural', on one hand, and the 'extra-legal environment', on the other. However, Kischel also writes that 'solutions may well be extra-legal and marked by legal culture'.[305] Literally, *lit-er-al-ly*, these misexpressions attest to the fact that Kischel does not know what to do with 'culture'. The main difficulty for Kischel is in all likelihood that culture does not fit his law-as-science world-view — of course, it does not! And while he is able to intuit that culture is 'something' that must matter to the edification of foreign-law research, 'something' that cannot simply be tricolating comparative law, he is at a complete loss to articulate a coherent theoretical dynamics between the cultural and the legal — hence the macaronic jumble that I have described.

Still doing my charitable best to read through the conceptual and terminological mess — a deplorable and avoidable situation — I suggest that one basic conclusion can fairly be drawn from *Comparative Law*, which is that Kischel mobilizes a binary distinction between what he regards as pertaining to the law — whatever that is exactly — and what he regards as not pertaining to the law — again, whatever that is exactly (without, incidentally and not at all insignificantly, providing a criterion to distinguish between the two configurations). Ultimately, it appears that for Kischel a law-text — say, a statute or a judicial decision — can feature content that is only legal, in other words legal content that is 'context-independent'.[306] Meanwhile, there can be found around a law-text (consider the etymology of the word 'context'), as an accompaniment to a law-text, along with a law-text, the 'societal, historical, and political background',[307] what Kischel also terms 'the extra-legal background, such as relevant social, historical, economic, moral, or religious

296 Id at 211 [my emphasis].
297 Id at 199 [my emphasis].
298 Id at 185 [my emphasis].
299 Ibid [my emphasis].
300 Id at 143.
301 See Id at 180.
302 Supra text at note 206.
303 Supra text at note 207.
304 Kischel, U *Comparative Law* supra note 1 at 88.
305 Id at 211.
306 Id at 173.
307 Id at 173-74.

elements'.[308] It remains unclear, though, whether any of these 'elements' would have anything to do with culture since Kischel locates culture on more than one occasion on the hither side of the divide, with the legal.[309] I am led to ask: *where on earth is culture?* And if, indeed, the fabric of culture does not embrace 'social, historical, economic, moral, or religious elements', *what on earth is culture's consistence?*

Frankly, I cannot see how such a profoundly chaotic presentation (and, presumably, such addled thinking) can even begin usefully to inform a serious theory of comparative law.[310] In the end, the one steadfast commitment that I think is discernible out of the throughotherness is Kischel's dedication to the idea that the legal (howsoever delineated) differs from the political or from the social, to confine myself to these two terms for illustrative purposes, which would both pertain to the law's context (and which would somehow be understood as not-culture). Now, I regard this binary distinction as crude — and Frankenberg rightly refers to 'the conundrum of bogus contexts'.[311] (For his part, Derrida — yes, the 'postmodernist'-in-chief *soi-même* — observes that the term 'context' is not 'rigorous',[312] that it is marred by 'a certain confusion'.[313] He notes that 'its determination is never assured',[314] and he deplores its 'theoretical insufficiency'.[315]) The simplism of Kischel's argument, however, betrays a primordial compulsion that one can readily associate with the law-as-science model: to carve for the law a place that would allow it to stand apart from all other disciplines — or, more accurately, above them. (For Zweigert and Kötz, too, there was the law here and everything else over there — hence their unexamined statement to the effect that the comparatist would occasionally have to consider 'extra-legal phenomena'.[316]) The law would exist *an sich*, so to speak, a conceptualization and a systematization that readily evoke to my mind Bernhard Windscheid's 'jurist as such'.[317]

Now, even if it made any sense for an analyst or commentator to allocate matters to the legal or non-legal realms, to law or to law's context, Kischel does not offer any yardstick or benchmark — he does not indicate any specification — that would govern

[308] Id at 103.

[309] See supra text at notes 301 & 304 — where culture is expressly situated with the legal. Of course, culture is also explicitly said to belong to the 'extra-legal': see supra text at notes 302 & 305.

[310] Nothing appears to turn on the English translation. For instance, in German 'the legal and non-legal context' (Kischel, U *Comparative Law* supra note 1 at 189) is '*der rechtliche wie nichtrechtliche Kontext*' (Kischel, U *Rechtsvergleichung* supra note 2 at 204); 'legal and non-legal environment' (Kischel, U *Comparative Law* supra note 1 at 220) is '*(das) rechtliche und außerrechtliche Umfeld*' (Kischel, U *Rechtsvergleichung* supra note 2 at 239); 'the legal and extra-legal context' (Kischel, U *Comparative Law* supra note 1 at 211) is '*de(r) rechtlich(e) und außerrechtlich(e) Kontex(t)*' (Kischel, U *Rechtsvergleichung* supra note 2 at 228); 'legal-cultural, and even extra-legal environment' (Kischel, U *Comparative Law* supra note 1 at 259) is '*(das) rechtskulturell(e) und sogar außerrechtlich(e) Umfel(d)*' (Kischel, U *Rechtsvergleichung* supra note 2 at 93); and 'context-independent' (Kischel, U *Comparative Law* supra note 1 at 173) is '*kontextunabhängig*' (Kischel, U *Rechtsvergleichung* supra note 2 at 187).

[311] Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1009.

[312] Derrida, J (1990) *Limited Inc* Weber, E (ed) Galilée at 19 ['*rigoureux*'].

[313] Ibid ['*une certaine confusion*'].

[314] Id at 20 ['*sa détermination n'est jamais assurée*'].

[315] Ibid ['*insuffisance théorique*'].

[316] Zweigert, K & Kötz, H *Einführung in die Rechtsvergleichung* supra note 116 at 37 ['*außerrechtlicher Erscheinungen*']. For Tony Weir's published translation, see Zweigert, K & Kötz, H *Introduction to Comparative Law* supra note 116 at 39: '[T]he comparatist must sometimes look outside the law'.

[317] Windscheid, B (1904 [1884]) 'Die Aufgaben der Rechtswissenschaft' in *Gesammelte Reden und Abhandlungen* Duncker & Humblot at 111 ['*der Jurist als solcher*']. As he works on legal doctrine, Windscheid's 'jurist as such' ignores 'ethical, political, economic considerations': Id at 112 ['*ethischen, politischen, volkswirtschaftlichen Erwägungen*']. Windscheid was a professor of law who made a significant contribution to the drafting of the 1896 German civil code and continues to be ascribed institutional eminence in Germany.

this demarcation process. Or is one simply to operate and draft lines on a whim, as one goes along, so to speak? What seems beyond doubt, however, is that for Kischel lines must be drawn, and to that extent Kischel's attitude strikes me as insistently Kelsenian — which is why I am confident that he would concur with the view that, when all is said and done, '[t]he law counts only as positive law',[318] everything else having to do with the law's context. Kischel's principal contribution would then be to include context within the purview of comparative law — that is, not to limit comparative analysis to the bare posited law — hence 'contextual comparative law', although, as I observe, the semantic extension of 'context' remains thoroughly indeterminate. Indeed, it remains completely unclear.[319]

In the meantime, *Comparative Law*'s drive to keep the legal separate — or pure! — can indeed go to extraordinary lengths. Consider Kischel on abortion or the death penalty: 'Demands made in [...] areas [such as abortion, the death penalty, or protection for private property] should be considered political, not legal. The idea of universal human rights is discredited by subjecting these matters to a political critique disguised as a legal one'.[320] I find it very hard, in all honesty, to make sense of this statement. What is Kischel trying to say? Reading and re-reading him charitably, I find that he appears to be making three claims: that 'political critique' can and must be distinguished from 'legal [critique]'; that as regards abortion or the death penalty, an exclusively 'legal [critique]' is both feasible and advisable; and that should the 'legal' critique somehow reveal a 'political' hue, '[t]he idea of universal human rights [would be] discredited'. Ultimately, I must acknowledge defeat because I am unable, try as I may, to appreciate how the inability to produce a legal critique that would be pure, that would be devoid of the slightest political connotation — even assuming, *concessio* very firmly *non dato*, that such an epistemic feat should be at once possible and desirable — how such incapacity, then, must 'discredit' what Kischel styles '[t]he idea of universal human rights'. It is not that I value '[t]he idea of universal human rights', for I do not. (Briefly, I hold that every universalism requires to be someone's universalism, which must mean that universalism pertains to fiction and is therefore epistemically unwarrantable.) But the rhetoric of 'discredit' baffles me and strikes me, at the very least, as pointing to a rather spectacular *non sequitur*.[321] There is more. If Kischel's abiding preoccupation is that the legal should not be contaminated by the political so as to protect the legal's claim to universalism, it is unclear how he manages to reconcile 'universalism' with the idea of 'context' that is *Comparative Law*'s leitmotiv. Are the two terms not profoundly antithetical?

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Since 1995, in particular as of 2011, I have released a number of texts where I have argued for a much more progressive and, I contend, much more realistic approach to the legal (not that Kischel's reader would know about any of these writings, which *Comparative Law* resolutely ignores).[322] This essay does not seem the proper forum to rehearse my

[318] Kelsen, H (1934) *Reine Rechtslehre* Deuticke at 64 ['*(d)as Recht gilt nur als positives Recht*'].

[319] Eg: supra, text at note 234.

[320] Kischel, U *Comparative Law* supra note 1 at 44.

[321] Once more, nothing appears to turn on the English translation for the German text has '*diskreditiert*': Kischel, U *Rechtsvergleichung* supra note 2 at 46.

[322] Eg: Legrand, P (2011) 'Siting Foreign Law: How Derrida Can Help' (21) *Duke Journal of Comparative & International Law* 595; Legrand, P (2017) 'Jameses at Play: A Tractation on the Comparison of Laws' (65) *American*

model at length — after all, I am responding to Kischel's work rather than promoting my own wares. Suffice it, then, to make brief references to two clear examples and intersperse the scenarios with a few basic (and clear) theoretical observations.

Enter Imogene, a young anglophone Canadian comparatist, fluent in French and knowledgeable about French law and French legal culture. It is June, and Imogene is on her way to the Sorbonne law library where she will be working for one month trying to make sense of the French statute on religious attire in public schools (kindly note: to *make* sense of the statute...). She comes to Paris as a woman issuing from a multicultural society, and she finds it hard not to regard the French statute as a textbook example of intolerance, if not of outright discrimination. But, even as she appreciates that she cannot rid herself of her prejudices, Imogene is determined to keep her anterior judgments in check. Soon, Imogene is staring at the statute book and reading the legislation in French. What is there, there, before her? There is a statute, that is, a law-text. But, she observes, that law-text is also a political enactment. It makes a statement about French republican politics: it affirms, in effect, that from the standpoint of French republicanism, religious dictates with respect to attire will not be accommodated in public schools. In the process, she remarks that the statute fits into a long-standing French tradition of political interventionism in religious matters (she is thinking, for instance, of the 1598 Edict of Nantes, of the 1685 Edict of Fontainebleau revoking the Edict of Nantes, and of the 1905 statute on the separation of the churches and the state). But Imogene realizes that the law-text is also a social enactment, if only because it is authoritatively organizing the students' social space in public schools. Indeed, the principal idea informing the French state's articulation of the social space in public schools is that it ought to remain free of any form of religious proselytization whatsoever, so much so that no conspicuous expression of religious belonging will be allowed. From the perspective of the state, the students' social space at school must be reserved for the transmission of republican values such as equality — and a *hijab*-clad Muslim teenage woman or a Jewish teenage man wearing a *kippah* would be offending against the French republican understanding of 'equality'.

Imogene thus forms the view that the French statute exists at once, simultaneously, as a law-text, as a political enactment, and as a social statement. It is not that the law is here, while the political and the social are out there, somewhere else, as the non-legal or the extra-legal. The political and the social have morphed into the statute, they have taken the form of the statute, they have become part and parcel of the statute, they live on as the statute, they are of the statute. Imogene thinks of the political and the social as *jurimorphs*. (She borrows the term from Bruno Latour's.[323]) As she proceeds to undertake a spectrography of the statute, so to speak, she discerns those various constitutive dimensions. Of course, she accepts that the political enactment or the social statement may not appear as evidently as the legal enunciation. But these other discourses are nonetheless very much present, within the text, as the text: there are traces of the political and of the social lurking between the lines of the statute, so to speak — unsurprisingly, really, since the statute is worldly. It is of the world, and it is in the world: it evinces worldly attachments (how could it not?). It follows that when Imogene is integrating the political or the social into her analysis of

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[323] Latour, B (2015) 'The Strange Entanglement of Jurimorphs' in McGee, K (ed), *Latour and the Passage of Law* Edinburgh University Press at 331-53. Latour credits Kyle McGee.

the statute, when she is tracing the statute to its political and social components, she is not leaving the law. Quite to the contrary, she remains well within the law-box except that she is digging or drilling into the law-text to elucidate — to bring to light — what it is made of, to expose its fabric (remember the etymological connection between text and textile: Imogene is trying to identify the threads that have come together as this statute). If you will, she is engaging in archaeological or genealogical work: she is excavating past the 'black-letter' surface of the text in order to trace the statute's ancestry. And there is no doubt in Imogene's mind that the political and the social that she is elucidating — that she is bringing to light — are cultural. Otherwise said, the political is French culture speaking politically, and the social is French culture speaking socially. And the law-text is French culture speaking legally. Imogene readily thinks of culture — a territoried group's collective experience of the world — as a cube: it has many facets (and one can never see all facets at once). Crucially, Imogene is very much involved in the tracing that she is pursuing, and she sees herself as being so involved. It is her tracing, not someone else's — which entails that there are aspects of the statute's meaning that Imogene will choose to foreground at the expense of others and which also implies that there are dimensions of meaning that Imogene will overlook (whether deliberately or not). After all, Imogene is the interpreter that she is, and she cannot be any other. More accurately, she is the interpreter that her enculturation has made her, and she cannot be any other. And *she* is making sense of the statute — not someone else.

I have another illustration, which also features Imogene. It concerns the US Supreme Court decision in *District of Columbia* v *Heller*.[324] In *Heller*, the Supreme Court sought to interpret the Second Amendment to the US Constitution, which reads thus: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed'. Writing for a bare majority of the Court, the late Justice Antonin Scalia held that '[t]here seems […] no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms',[325] and he emphasized that 'the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense'.[326] Imogene — who has now turned her comparative attention to US constitutional adjudication — understands very well that to maintain a division between 'the law' here (say, the text of the US Supreme Court's authoritative reading of the Second Amendment) and the 'non-law' there (seemingly, for instance, politics and ideology) is wholly artificial. Moreover, she realizes that to think in this binary way — which means relegating, say, politics and ideology to 'context' — makes it so very easy for those who claim to be doing law-and-only-law cavalierly to dismiss the political and the ideological discourses as irrelevant to law or, well, as merely 'contextual' vis-à-vis law. But Imogene will not be duped. As she proceeds to yet another one of the tracing exercises that consistently inform her comparative work, she discerns traces of the political and of the ideological within the judicial decision, *as* the judicial decision. These traces are present, they are component parts of the text of the judicial opinion — if only one is willing to read between the lines, so to speak. The Scalia judgment is political — it is federalist (it adopts a 'national' reading

[324] (2008) 554 US 570.
[325] Id at 595.
[326] Id at 683.

of the Second Amendment rather than leave the matter of interpretation for the individual states to assess). And it is ideological — it is conservative (it favours individualism, the right to be let alone, and legislative restraint). Again, Imogene has not the slightest doubt: quite apart from being a law-text — which it obviously is on account of the fact that it is produced by the US Supreme Court in its institutional capacity — the Scalia opinion is inherently political and intrinsically ideological to the point where the political and the ideological cannot be severed from the legal: they inhere to the legal, they haunt it. And the positivists who refuse to appreciate this assemblage, this entanglement, are simply not doing justice to the structural complexity of the law-text in existence. As a matter of empirical fact, 'the "text" does not reduce itself […] to the sensible or visible presence of the graphical or of the 'literal'".[327] Rather, '[a] text […] is at the same time the condensation [...] of history, of language, of the encyclopedia [...]. In a minimal [...] trait can be gathered the greatest potentiality of historical, theoretical, linguistic, philosophical culture […]. […] To resist this paradox in the name of a so-called reason [...] is the very figure [...] of modern obscurantism'.[328] And, here also, just as had been the case at the Sorbonne, Imogene is *involved* in the tracing that takes place; *she* is making sense of the judicial decision — not someone else.

But let me interrupt my account of Imogene reporting on the French statute and on *Heller* in the US Supreme Court (my two clear examples of the progressive and realistic approach to the legal that I defend — which, incidentally, properly makes comparative law into a *regio dissimilitudinis* without, needless to add, the Augustinian overtones), and allow me to turn to my closing observations on Kischel's *Comparative Law*.

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There can be no question of descrying an intellectual enterprise *ad arbitrium*, to awfulize it for the sake of playing Peck's bad boy — no matter how imperturbably the critique's addressee can be expected to react. However, there can be no question either of allowing an academic publication to evade the demands of legitimate scholarly scrutiny, irrespective of how *imperious* the claims on offer. No doubt controversially, I want to suggest that *Comparative Law*, a one-thousand-page text devoting very, very many hundreds of words (not all of them small) to a purported account of the world's laws, must be understood in significant respects as an exercise in epistemopathy — there is pathos informing this hapless quest for total legal knowledge — and as an endeavour in epistemopathology — there is folly marking this doomed attempt at self-transcendence. On the understanding that no effort at elaboration of knowledge is devoid of affect, no matter how seemingly ascetological, no matter how deliberately alleging to be abiding by the logic of ascetism, what, then, is Kischel's desire? While I am obviously not in a position to ascertain the feelings that have actually acted as the executive force driving Kischel's project, I submit that the material contours that the venture has assumed — consider the size, the weight of

[327] Derrida, J (1972) *Positions* Editions de Minuit at 87-88 ['*le "texte" ne se réduit(t) pas (…) à la présence sensible ou visible du graphique ou du "littéral"*'].

[328] Derrida, J (with Attridge, D) (2009 [1989]) '"Cette étrange institution qu'on appelle la littérature"' in Dutoit, T & Romanski, P (eds) *Derrida d'ici, Derrida de là* Galilée at 262 ['*(u)n texte (...) est en même temps la condensation (...) de l'histoire, du langage, de l'encyclopédie (...). Dans un trait (...) minimal peut se rassembler la plus grande potentialité de culture historique, théorique, linguistique, philosophique (...). (...) Résister à ce paradoxe au nom d'une soi-disant raison (...), c'est la figure même (...) de l'obscurantisme moderne*']. The words are Derrida's.

the book — supply presumptive evidence reaching beyond mere hunches or impressions. Even as it would be excessive for me to ascribe the quality of irrefragability to my argument, I do not accept that Kischel enjoys the capacity convincingly to rebut it, if only because I am addressing an emotional investment that may not pertain to full consciousness and perhaps not even to semi-consciousness. There is an important sense, therefore, in which no one will ever know the spectrum of deep feelings that Kischel's ambition exacted and in response to which his knowledge-strategy unfurled and sustained itself — not even Kischel (no, Kischel cannot ultimately *know* his knowing, he cannot *know* what he has been doing). Still, I contend that the momentous and enormous character of the undertaking justifies the formulation of certain lines of epistemic inquiry, if only in most preliminary fashion. It must then fall to my readership, if interested, to assess the yield or affordance that these hypotheses may potentially generate.

In *Comparative Law*, which I have meticulously considered, I discern a striving, at once sad and delirious, to make the world's laws into the docile theme of authorial omnipotence and omniscience. I observe the formulation of a legal cosmos that the author's mind would encompass and therefore control. I see the expression of a lust for the compliant accordance of the world's laws with one's intellectual order, for a *colonization* of the world's laws. I note the implementation of a dream of governance over the immensity of legal knowledge seeking contentedness in the adjustment of the available information to one's focal length. In the absence of any authorial awareness of surrender to the delusions of systematization and totalization, what could be more gratifying to a comparatist-at-law than the idea that, in effect, no law in the world can escape his assertive arrangement? Kischel's rapturous attempt to embrace the whole, his excited infatuation for entirety, his yearning for comprehensiveness is, *à la lettre*, fantastic, in the sense at least that it ambiates in the realm of fantasy and that it is indeed indissociable from fantasy.

One of the specific forms that fantasy adopts — perhaps the predominant shape that it takes — is that in his book Kischel would actually be conveying *knowledge* about the world's laws. But the fact is that in the course of his Cook's tour, Kischel very largely depends on the views of individuals whom he is willing to regard as local (or, so frequently, German) experts — although it is far from clear how he judges an author (local or German) to be a reliable repository of documentation in an area in which he himself often cannot act as an authoritative source. Having identified what he deems to be trustworthy texts, Kischel rarely pursues the chain of authority any further. In his urge to use documentation rather than verify it, he habitually fails to seek a 'first knower', that is, he *satisfices* (and, with astonishing regularity, he satisfices once he has come across a text in German, his native language). The fact that hundreds upon hundreds of enunciations as regards foreign laws are left uninvestigated compels one to ask whether one ought not to be talking about Kischel holding *beliefs* about foreign laws rather than having knowledge of them. Be the credal postulate as it may, it should be obvious that Kischel's avouchments regarding foreign laws effectively materialize as *meshwork*, the outcome of adventitious and messy tactics — and certainly cannot have anything to do with anything like 'objectivity' or 'truth', despite what 'legal scientists' may care to think. Perhaps there is on display, when all is said and done, more of a gnawing than a knowing pursuit.

I am willing to enter one important allowance, however, inasmuch as I am prepared to accept that *Comparative Law* also stands as the implementation of an epistemophilia, that it is the expression of a love of knowledge, of a longing for knowledge, too — and possibly of an eagerness to transmit knowledge, also. Again, I do not *know*, and I cannot *know*, but I

am disposed to grant the plausibility that such epistemic aspirations should have featured in the planning of this scholarly scheme. And if my intuition is sound, this fact goes to Kischel's credit. Yet, my complaint remains that this project has been imprudently allowed to swerve into obsession and incongruity — hence, for example, the gaps, the errors, and the locuplete theoretical shambles that I have indicated.

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Kischel writes that the comparatist's difficulties are 'ultimately unresolvable',[329] which entails that '[a] certain imperfection is inevitable'.[330] He adds that '[t]he only possibility is to forge ahead yet again to the best of one's knowledge and with full awareness of one's limitations, and to try and build on the work of others, gradually arriving at new insights'.[331] I wholeheartedly agree. Still, there is imperfection and imperfection, and there are limitations and limitations. *Comparative Law*'s deficiencies are very serious, not least as regards its proposed theoretical model, which has been the principal focus of my reaction to the book. With respect to the title of my essay, I have already indicated, making reference to the matter of translation, that vis-à-vis Zweigert and Kötz's text, Kischel's contribution can be read to mean 'progress without progress'. But in German '*Fortschritt*' may also signify 'update'. And, still by comparison with Zweigert and Kötz's endeavour, Kischel offers either an 'update without progress' or 'progress without an update' — that is, in either case, new discussions without a departure from orthodox comparative law's long-established theoretical commitments. Moreover, at least when one reads the English version, one often feels that one is addressing 'an update without an update' (that is, a 2019 text that effectively went 'dead' in 2014). Even if orthodox comparative law seems incapable, certainly at this present juncture, of resisting the gravitational pull of German legal scholarship, it ought to find it possible to escape the orbit of Kischel's *Comparative Law* and its 'preten[sion] to be able, of being able, of doing a little better the same old thing, of going a little further along a dreary road'.[332]

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Gary Watt is well inspired to claim that 'the comparison of cultures, including legal cultures, ought to be complex and [that] it ought to be deep', that '[i]t is bound to be deep'.[333] And his insight is sound when he adds that 'the only comparative law scholars who have cause to fear necessary complexity are those who are biased towards seeing comparative law as a means to achieving some predetermined outcome such as uniformity between national laws'.[334] Accordingly, Watt is justified in reminding his readership that '[w]e should not search unknown lands in order to find something that we have already placed there to be discovered',[335] that 'our scholarship should always be open-minded and searching

329 Kischel, U *Comparative Law* supra note 1 at 33.
330 Ibid.
331 Ibid.
332 Beckett, S (2006 [1949]) 'Three Dialogues' in *The Grove Centenary Edition* Auster, P & Coetzee, JM (eds) vol IV Grove Press at 556.
333 Watt, G '"Comparison As Deep Appreciation"' supra note 192 at 90.
334 Ibid.
335 Ibid. Cf Vining, J (1986) *The Authoritative and the Authoritarian* University of Chicago Press at 65: '[T]he comparativist presumes similarities between different jurisdictions in the very act of searching for them'.

in a genuine sense',[336] that '[t]he aim of comparative law scholarship ought to be deep appreciation of others',[337] that 'we ought to expect that this will require an appreciation that is in many respects complex',[338] and that even if 'that task is a daunting one, we should not shun it in favour of superficiality, but take comfort in the fact that greater evil will come, and has come, through streamlined superficiality than will ever come from deep appreciation'.[339] Yes. (In my view, although not necessarily in Watt's opinion, it follows that one ought to be impatient with the demand that the comparatist's sentences should be immediately clear without any further intellectual exertion being required, that one ought to reject instantaneous legibility as a decidedly false idol.) Although falling very short of Watt's bar, Zweigert and Kötz's textbook, despite the fact that it has long been 'in need of dire revision',[340] 'still sets the standard',[341] not a gold standard, certainly, but something like a brass standard, perhaps.

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Throughout this essay, I have been at pains to let Kischel speak in his own voice, mostly in English but also in German. I trust that the large number of quotations from his book in both language editions attest to the fair implementation of my strategy. However, I am aware that Kischel has also expressed himself in English in two other venues, where he has sought to defend his enterprise. I find it useful to refer to a few of the statements that he made on these two occasions. In his rejoinder to Frankenberg's critique of his *Rechtsvergleichung*, Kischel thus indicates that '[his] contextual method [...] proudly considers itself part of the mainstream'.[342] While it is helpful to secure this confirmation, I reckon that no reader of *Comparative Law* can doubt Kischel's allegiance for a moment. Other than that, Kischel holds that 'if your aim is to do comparative law, and to do it well, [*Comparative Law*] is the book for you'.[343] My close perusal of Kischel's very long text informs me, clearly, that comparatists-at-law would do very well indeed *not* to take this self-serving expression of confidence at face value especially if, like me, they think of the comparison of laws as an intervention in the fullest response to foreignness, rather than an occasion for analytical vehemence, and if they value intellectual rigour and careful writing, rather than fickle thinking and confusing scribbling. Still, I do agree with Kischel when he claims that 'the motto for writing a treatise on comparative law should be: If you don't know, or if you don't understand, *work harder, until you know and understand!*'.[344] In fact, I could not have written it better myself. Perhaps using some of the time that was evidently not devoted to updating the English edition, Kischel should have sought to implement his own excellent advice.

[336] Watt, G '"Comparison As Deep Appreciation"' supra note 192 at 90.
[337] Ibid.
[338] Ibid.
[339] Ibid.
[340] Frankenberg, G '"Rechtsvergleichung" — A New Gold Standard?' supra note 3 at 1002.
[341] Ibid.
[342] Kischel, U (2016) 'Critical Legal Studies, Postmodernism and the Contextual Method in Comparative Law — A Reply to Günter Frankenberg' supra note 270 at 1011.
[343] British Association of Comparative Law (29 April 2019) 'Interview with Uwe Kischel on His Book *Comparative Law* (OUP 2019)' https://british-association-comparative-law.org/2019/04/29/interview-with-uwe-kischel-on-his-book-comparative-law-oup-2019/ [my emphasis] (on file).
[344] Kischel, U (2016) 'Critical Legal Studies, Postmodernism and the Contextual Method in Comparative Law — A Reply to Günter Frankenberg' supra note 270 at 1012 [my emphasis].

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Last paragraphs, my secondary-school teachers taught me, should open further lines of investigation. *So sei es* (in a thousand words or so, an arbitrary self-imposed limit). Ah! Let me enter a 'trigger warning' for those who claim to be uncomfortable with 'big words': I am concerned to eschew the fallaciloquence that I associate with established comparatists (or individuals aspiring to be recognized as established comparatists), and that I see continuing to spread like kudzu or carp.

There is compelling empirical evidence to the effect that on or about March 1995, in London, the character of comparative law revealed its capacity to change. Yet, epistemic overhauls do not happen with a yark, and the primordial enfeebling of the positivist paradigm remains to come (including the dismantling of the ideological scaffold on which legal analytics perches itself to proclaim its scientificity and neutrality — such discursive gimmicks being strategically marshalled in order to conceal actual technologies of epistemic power). And the exposition of the workings of the dominant ideological system, of its epistemological premisses, not only in terms of its basic categorizations and exclusions but also as regards its fundamental assumption that the comparison of laws is the purposive action of actors whose Rational thought somehow originates in their own minds *and* is somehow able Methodically to access the ontological Reality of the foreign, is yet to be achieved. In the meantime, ignoring the fact that the massive authority of the writer largely controls the foreign law being studied and the comparative claims being made about it, foreign law remains predicated, if erroneously, on a stable ground: there would be a fixed object, a foreign law-text, dwelling there, that would be recoverable as such by someone, a comparatist, coming to it from here. The foreign law, then, would be present, in the French statute book or in the US law reports, expecting its comparatist (with as much trepidation, I wonder, as an Amazonian tribe awaiting its anthropologist?).

Now, only a genuine exercise in meta-comparison — a reflection on how comparative law effectively operates, on how it is thought, on how it is practiced as it proceeds to constitute foreign meaning — can reveal that as soon as the comparison is instigated, the so-called 'foreign' no longer harbours any independent ontological reality. What takes place, always-already, is an inextricable intertwinement of the foreign law and of the comparatist, of the 'there' and of the 'here', an interlacing that effectively transforms the 'there' into a problematic construction. That assemblage prohibits any comparatist from telling the foreign *an sich*, *tel quel*, from getting it *right*, given that he is irreducibly interpretively involved in the foreign even as he cannot interpretively access the foreign (paradoxically, the comparatist cannot not-be in the foreign even as he cannot be the foreign). Any idea of the self-extinction (*Selbstauslöschung*) of the comparatist that would allow for a representation of the foreign fully supplanting the comparatist's presence is untenable since the epistemic co-ordinates by which one makes sense of the foreign cannot operate apart from one's ontological position as a comparative being. And even as the comparatist traces a pathway to the foreign that activates the latent ontology — there is something, there — any and all understanding of the foreign inevitably takes place within the comparatist's mind, that is, in 'hereness', therefore in an epistemic location necessarily non-coincident with the location of the foreign, there.[345] One can also look at the matter this way: the foreign guards some of

[345] Cf Derrida, J (2010 [2002]) *La Bête et le souverain* Lisse, M, Mallet, M-L & Michaud, G (eds) vol II Galilée at

its foreignness at least, that is, it refuses to allow all of its foreignness to dissolve through an act of total interpretive appropriation by the comparatist. If you will, the foreign is *autoimmune*. For this reason also, the comparatist cannot be proferring the reality of the foreign as such when he writes about a French statute or a US judicial decision. What he enunciates, and all that he can assert, is his *conviction* that there is the reality of the foreign. I accept, of course, that the comparatist's disciplinary training — in particular a German dressage into a peremptory scholarly tradition and its commanding idiom — can make it extremely difficult for him to move away from the idea that foreign law meaningfully exists as such, in advance of any comparative intervention, and that it can be replicated as such through the comparative intervention. (I understand how publishers' and promotion committees' expectations reinforce disciplinary blindness. And I see that, if anything, this vicious circle is compounded by the emergence of technetronic scholarship as the taming of 'hard' data — for example, through the proliferation of institutional websites — fosters the consolidation of positivism and empiricism and of the conservative ethos that these intellectual inclinations betray.)

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No matter how apparently excellent the comparatist, and no matter how seemingly transparent the foreign law, the goal of foreign-law research, of comparative law, cannot be exactness or accuracy, objectivity or truth. The comparatist must adjust his epistemic sights and accept that no comparison will be perjink: he must learn to be open to uncertainty — to ephemerality and to mutability — to expect and even to welcome indeterminacy, to appreciate the advantages of it, to be curious because of it rather than frightened by it, to be enhanced by it instead of diminished by it. As he comes to find the French statute or the US judicial decision where it dwells, all that the comparatist can do — and what he must emphatically do — is to fashion an interpretation of it, an *encultured* interpretation of it, the main challenge being for that framed interpretation, for that re-presentation, to do justice to the foreign law, to prove just vis-à-vis foreignness, to tell the foreign law not identically, then, but justly, which must involve tracing foreignness to its constitutive cultural dimensions. Is there a verb that captures both motions and that conveys, economically, at once the act of finding the foreign law-text *and* the act of fashioning, through tracing, what can only be an interpretation of the foreign? Yes, there is such a verb, and that verb is 'to invent'.

What is needed, what is wanted, and what is yet to come, is therefore a meta-comparison explaining how the comparatist *invents* foreign law and what are the implications of the comparatist's *invention* of foreign law. Yes. The comparatist *invents* foreign law, and he does so in a manner that is inevitably non-coincident with the foreign that is there, before him, and that his invention is *the invention of*. Across the line that separates the self from the other — and that must so separate the self from the other if the other is to remain the other — there is no dialectical warrant for an epistemic intervention that would not be an invention. In comparative law, *intervention is invention*. As I say, the thinking of this process remains to come — at least if one wants to explain comparative 'cognition' rather than falsify it. So do the inventive comparisons themselves.

31: '[T]here is no other [world] for me, any other world being part [of what I call "my world"]' ['*(I)l n'y (...) a pas d'autre (monde) pour moi, tout autre monde (...) faisant partie (de ce que j'appelle "mon monde")*].

CODA

To Invent

Etym.: *in-*, *venire*: to come in or to come to [in the sense of 'to fall upon']; *inventio*: a discovery, a finding [that to which one comes, that on which one 'falls upon']; *inventor*: he who comes to something, who discovers, who finds, he who 'falls upon' something.

1. To discover or to find something that exists already, thus a treasure (or a planet).

Example (i). The notion of invention relates to the discovery of a treasure that allows one, under certain circumstances, to acquire ownership of the property. One speaks of acquisition of ownership through invention as opposed to acquisition by other means. See Article 716 of the French civil code. But particular statutes qualify this form of acquisition of movable property: through strict regulation of invention, they transfer to the state, in most cases, the product of the invention.

Example (ii). In the Roman liturgical rite, there was celebrated on 3 May the feast of the Invention of the Holy Cross (*Inventio Sancta Crucis*), that is, the discovery of the Holy Cross by Saint Helena in 326. This feast was abolished by Pope John XXIII in 1960. The Church of the East still celebrates the Invention of the Holy Cross on 13 September, which it regards as a major feast.

Application to comparative law. The Australian comparatist who writes on French law is coming to French law in the sense that he finds it or discovers it — for instance, in the Sorbonne law library — in the shape of legislative texts, judicial decisions, or scholarly writings.

2. (since XVIth c.) To produce, shape, forge, realize first something new, to find through the force of creative imagination. *To invent an instrument, a game, a machine, a medication, a fashion, a proceeding*.

Application to comparative law. The Australian comparatist who writes on French law makes it come to him in the sense that he produces, fashions, or forges it through the interpretation that he proposes of it. Through the force of his creative imagination, he realizes an interpretation of French law, necessarily first or new — since each interpretation is inaugural, unique.

Here, 'invention [...] produces what [...] was certainly not to be found there but is still not created, in the strong sense of the word, only assembled starting with a stock of existing and available elements, in a given configuration'.[346]

[346] Derrida, J *Psyché* supra note 77 at 35-36 ['*l'invention (...) produit ce qui (...) ne se trouvait certes pas là mais n'est pas pour autant créé, au sens fort du mot, seulement agencé à partir d'une réserve d'éléments existants et disponibles, dans une configuration donnée*'].

MORE THOUGHTS

The Australian comparatist invents French law, twice. He finds or discovers it in the Sorbonne law library. Then, he produces, shapes, or forges it through interpretation.

The idea of 'invention' underscores the active role of the Australian comparatist, twice. He comes to the French law that already exists, on one hand, and he makes the French law come to him so as to build or edify it — to make it exist (meaningfully) — on the other.

'[T]he concept of invention distributes its two essential values between the two poles of the constative (to discover or disclose [...]) and the performative (to produce, institute, transform)'.[347]

There is an 'infinitely rapid oscillation' between the constative and the performative.[348]

'[O]ne would not say today that Christopher Columbus invented America [...]. [...] [U]sage or the system of certain modern, relatively modern, conventions would prohibit us from speaking of an invention whose object would be an existence as such'.[349]

'[O]ne must today reinvent invention'.[350]

[347] Id at 23 ['*(L)e concept d'invention distribue ses deux valeurs essentielles entre les deux pôles du constatif (découvrir ou dévoiler [...]) et du performatif (produire, instituer, transformer)*'].
[348] Id at 25 ['*oscillation infiniment rapide*'].
[349] Id at 41 ['*(O)n ne dirait plus aujourd'hui que Christophe Colomb a inventé l'Amérique (...). (...) (L)'usage ou le système de certaines conventions modernes, relativement modernes, nous interdiraient de parler d'une invention dont l'objet serait une existence comme telle*'].
[350] Id at 37 ['*(I)l faut aujourd'hui réinventer l'invention*'].