Comparative Law

Past Final Examinations (2004-2019)

Not only is Hein Kötz's "*praesumptio similitudinis*" empirically unsound, it is also theoretically indefensible. In order to ensure its intellectual credibility, comparative legal studies must jettison the "*praesumptio*" and the commitment to functionalism that underwrites it. Discuss.

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U.S. philosopher Richard Rorty claims that there is "no rigorous argumentation that is not obedience to our own conventions". How, if at all, does this statement challenge the feasibility and the credibility of comparative legal studies?

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The "sameness" across different laws that orthodox comparative research about law postulates is necessarily based on the repression and exclusion of pertinent differences located in the matrix within which any manifestation of posited law is inevitably ensconced. In sum, the specification of "sameness" can only be achieved if the cultural dimension of the law is artificially effaced from the analytical framework. Accordingly, the creation and maintenance of homogeneity across a range of posited laws must be regarded as a demonstrably violent enterprise. Only something like forcible interpretive closure can effectively claim that different manifestations of life-in-the-law constitute a non-conflictual and harmonious ensemble once artificially reduced to "sameness". Can these statements be supported?

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French philosopher Michel Foucault claims that "there is no resemblance without signature". He adds that "the world of the similar can only be a marked world". How, if at all, does this statement challenge the feasibility and the credibility of orthodox comparative legal studies?

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"Dissolving differences across laws in the solvent of a highly abstract notion of the similar may be satisfying on the level of ideology, but on the level of practice it is the differences, momentarily obscured by a fancy argument, that will always count". How meritorious, if at all, is this claim?

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To what extent, if at all, ought a comparativist seek to maximize cross-cultural agreement as she/he conducts comparative research in law?

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"Resorting to the unwieldy idea of 'legal culture' opens a Pandora's box of interpretive nightmares for comparative legal studies". How legitimate, if at all, is this concern?

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It has been said that *Lawrence* v. *Texas*, 539 U.S. 558 (2003) represents the first time that the U.S. Supreme Court has cited a foreign judicial decision in the process of overruling a U.S. constitutional precedent. Speaking extra-judicially, Justice Sandra O'Connor has suggested that, although the U.S. Supreme Court has occasionally referred to foreign materials before, a decision like *Lawrence* indicates a new approach to adjudication (it points to "the first indicia of change", in her words) : "conclusions reached by other countries […], although not formally binding upon our decisions, should at times constitute persuasive authority in American courts". Along converging lines, Justice Ruth Ginsburg has expressed the opinion that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights". But it is perhaps Justice Stephen Breyer's views that have been most widely aired. In an address to the American Society of International Law on 4 April 2003, Justice Breyer mentioned "the global legal enterprise that is now upon us". For Justice Breyer, "[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances". Consequently, according to Justice Breyer, there are to be found "cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas". In his view, these "growing institutional and substantive similarities […] reflect […] a near-universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity". To be sure, Justice Breyer acknowledges that "there may be relevant political and structural differences between [other nations'] systems and our own [*i.e.*, the U.S.']". But "[other nations'] experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem". For his part, Justice Antonin Scalia, writing extra-judicially, has expressed the following opinion : "It is my view that modern foreign legal materials can *never* be relevant to an interpretation of — to the *meaning* of — the U.S. Constitution". On the second day of his confirmation hearings in September 2005, Chief Justice John Roberts made a statement along converging lines : "I would say, as a general matter, that there are a couple of things that cause concern on my part about the use of foreign law as precedent. […] The first has to do with democratic theory. […] In this country, judges, of course, are not accountable to the people, but we are appointed through a process that allows for participation of the electorate. The president who nominates judges is obviously accountable to the people. Senators who confirm judges are accountable to people. And in that way, the role of the judge is consistent with democratic theory. If we're relying on a decision from a German judge about what our Constitution means, no president

accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country. […] The other part of it that would concern me is that, relying on foreign precedcent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. […] And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent — because they're finding prcedent in foreign law — and use that to detemine the meaning of the Constitution. And I think that's a misuse of precedent, not a correct use of precedent". Discuss the use of foreign law by the U.S. Supreme Court, offering personal and critical insight with appropriate reference to class materials.

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Within the field of comparative legal studies, most comparativists take the view that, superficial differences notwithstanding, laws are profoundly similar. Others, however, claim that underneath superficial similarities, laws are fundamentally different. In your opinion, are we being treated to an irrelevant debate or is this controversy meaningful?

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In their leading textbook, Konrad Zweigert and Hein Kötz state that "[t]he comparatist must sometimes look outside the law". What do you make of this claim?

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Richard Hyland, a U.S. comparativist, recently published a large book on the law of gifts from a comparative perspective. In the foreword, Hyland explains that, as he proceeded with his research on foreign laws, his goal was "to discover something of the meaning of the law that governs the giving of gifts". Law, he says, is not only a "normative force" but also a "cultural manifestation". In his words, "all the elements of the life of the law", not simply "actual legal text[s]", require consideration such that comparativists can "decipher and explicate the symbolic web in which legal norms are embedded". According to Hyland, comparative law must therefore adopt an "interpretive method". But, he adds, it is important that interpretation does not turn into "speculation". For Hyland, it is key that, with respect to every law under consideration, "interpretation remains faithful to the meaning of the law of gifts in contemporary society". Discuss.

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The eminent legal philosopher Larry Alexander writes that "our situatedness is as immaterial to our theoretical enterprises as it is inevitable". Discuss, making specific reference to comparative law.

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It has been argued that tracing should be adopted as the optimal investigative strategy into foreign law. Kindly make your strongest case against tracing.

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What are the best reasons one can offer to support the view that the Italian exporter of furniture and the Swedish importer of furniture ought not to want a uniform law of sale as between Italy and Sweden?

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To what extent, if at all, can a U.S. lawyer write a report on foreign contract law that would be objective?

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What normative value, if any, ought foreign constitutional law to be granted in U.S. adjudication?

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The task of the comparativist is to ascertain what the foreign law is. Discuss.

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On a given point of constitutional law, U.S. law can be right and French law wrong. Discuss.

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Method can keep the comparativist's prejudices in check. Discuss.

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"What makes a real world is difference of opinion" —T.S. Eliot. Discuss with specific reference to research into foreign law.

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"I am concerned with what the law [i]s" (James Gordley). Discuss with specific reference to research into foreign law.

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There is “the non-legal or pre-legal origin of the legal” (Jacques Derrida). Discuss with specific reference to research into foreign law.

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Writing with specific regard to human rights, University of Chicago law professor Eric Posner states as follows: “All countries are different and all countries have different needs. For his part, the late New York University law professor Ronald Dworkin wrote thus: “You might worry that it is both arrogant and impolitic to claim absolute truth as the basis of a theory of human rights. […] But we must do that — not to prefer one culture to another, but to prefer truth as we judge it”. Responding as a comparativist-at-law, kindly offer a personal and critical reaction to Eric Posner’s and Ronald Dworkin’s assertions.

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The late philosopher Hans-Georg Gadamer (†2002) held as follows: “One must look for the word that can reach another person. And it is possible for one to find it; one can even learn the language of the other person. One can cross over into the language of the other in order to reach the other. All this is possible”. Meanwhile, the late philosopher Jacques Derrida (†2004) wrote thus: “Between my world […] and any other world, there is initially the space and the time of an infinite difference, of an interruption [that is] incommensurable with all the attempts at passage, at bridge, at isthmus, at communication, at translation, at trope, and at transfer […]. There is no world, there are only islands”. Responding as a comparativist-at-law, kindly offer a personal and critical reaction to Hans-Georg Gadamer’s and Jacques Derrida’s assertions.

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In their leading textbook, Konrad Zweigert and Hein Kötz take the view that “[e]very legal system in the world is open to the same questions and subject to the same standards, even countries of different social structures or different stages of development”. Meanwhile, the International Institute for the Unification of Private Law, otherwise known as Unidroit, has developed principles purporting to govern international commercial contracts. According to Unidroit, these principles would operate “irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied”. Responding as a comparativist-at-law, kindly offer a personal and critical reaction to Konrad Zweigert and Hein Kötz’s and Unidroit’s assertions.

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London School of Economics and Political Science constitutional law professor Martin Loughlin writes as follows: “The journey of finding effective, enlightened and liberating conditions of government is a journey through history and on tracks formed within specific cultural traditions. The maps drawn by societies other than our own are undoubtedly of innate interest; indeed, their strangeness and their difference make us welcome. But as

guides to the journey they must be treated with great circumspection. It is precisely those aspects that welcome us which pose major barriers to understanding them as practical guides. Their accessibility is deceptive since we read them as outsiders and this leads too easily to distortion. If we are serious about confronting the complex issues raised by an inquiry into democracy and [constitutional] law, I believe that we must start by recognising that there can be no elsewhere which underwrites our existence". Meanwhile, University of Toronto constitutional law professor Ran Hirschl states thus: "It is undisputed that a considerable convergence of constitutional structures, institutions, texts, and interpretive methods has taken place over the past few decades. […] The increased constitutional similarity alongside patterns of persisting divergence opens up new comparative horizons. […] [T]here is copious similarity alongside sufficient degrees of difference to allow for some productive comparison, at least in theory". Responding as a comparativist-at-law, kindly offer a personal and critical reaction to Martin Loughlin's and Ran Hirschl's assertions.

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In 2006, Professor Steven Calabresi defended what he styled a "positive" version of US exceptionalism that "call[s] into question the practicality and wisdom of [the US] Supreme Court imposing foreign ideas about law on [Americans]". He noted how "Americans think […] that the United States is an exceptional country that differs sharply from the rest of the world and that must therefore have its own laws and Constitution". Indeed, he added, "this idea – that America is an exceptional nation, with an exceptional people and an exceptional role to play in the world – is deeply rooted in American history". In fact, he said, "not only do Americans think of the United States as an exceptional country, but it has actually become an exceptional country as it has attracted immigrants with a unique constellation of ideological beliefs. Americans are more individualistic, more religious, more patriotic, more egalitarian, and more hostile to unions and Marxism than are the people of any other advanced democracy". Calabresi emphasized: "Americans really *are* different from Europeans and Canadians, and for that fact many Americans are very grateful. The Constitution is the focal point of American exceptionalism: it is our holiest of holies, the ark of the covenant of the New Israel. Indeed, Americans' focus on the sanctity of their Constitution could be criticized as bordering on idolatry. Supreme Court interpretation of the Constitution in substantive due process cases with reference to foreign law calls the whole 400-year-old American project into question". Calabresi also observed as follows: "American exceptionalism is thus absolutely exceptional among all the exceptionalisms of the world because of the belief that anyone of any race or nation can become an American just by believing in a set of ideas. Ours is a universal creed, and it is not predicated on the nationalist belief that we are superior because of who we are. Americans think America is superior because of what Americans believe. For this reason, Ronald Reagan was absolutely right to describe us as a beacon of freedom for the whole world. America has in fact created the freest, most socially egalitarian, and most racially integrated society in the world. Our people are exceptionally religious, hard-working, patriotic, and devoted to philanthropy. In short America is a good country that is committed to good values in a way that Ancient Greece, Rome, the British Empire, and Nazi Germany were not. To demean American exceptionalism by equating it with the belief systems of these other hateful regimes is just

plain wrong. America is as plainly a good society as Nazi Germany was a bad society. While the United States has committed sins in our treatment of African Americans and Native Americans, we have worked very hard for a long time to rectify those sins. We are indeed, in the words of Abraham Lincoln and Ronald Reagan, 'the last best hope of man on earth'". According to Calabresi, "[t]his positive account of the ways in which the United States truly is exceptional […] call[s] into question the practicality and wisdom of our Supreme Court imposing foreign ideas about law on us". See Steven G. Calabresi, '"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law', 86 *Boston University Law Review* 1335-1416 (2006).

In 2015, Professor Steven Calabresi (with Bradley Silverman) argued that "looking to other sovereign nation states' courts to see how they have resolved the difficult questions that have arisen in [the US] legal system […] may enable American courts to reach better outcomes". He added that such cross-referencing "can be a powerful and helpful tool for American courts struggling with how best to understand and respond to the vagaries and indeterminacies that arise in the law". For Calabresi, references to foreign law present "a guide for how the United States may best conceptualize itself as […] a 'participan[t] in a common judicial enterprise'". In other words, such references offer "something of a loose roadmap for judges grappling with difficult but universal legal questions of how past jurists have navigated similar waters". To be sure, references to foreign law must operate "only in the same way judges currently cite books and law review articles — for their persuasive value — and not as binding sources of authority". See Steven G. Calabresi & Bradley G. Silverman, "Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron", [2015] *Michigan State L.R*. 1-181.

Kindly offer a personal and critical reaction to these two sets of excerpts.

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Making specific reference to the work of the comparativist researching foreign law and reporting on foreign law, kindly offer a personal and critical reaction to the quotation that follows: "[I]t would be a mistake to give up the truth-seeking aspiration of interpretation altogether" (Peter Lamarque, 2002).

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In his *'Partly Laws for All Mankind'* (Yale University Press, 2012), New York University law professor Jeremy Waldron takes the view that U.S. lawyers can meaningfully understand foreign laws. Specifically, he argues that '[t]he process is not greatly dissimilar to that involved in extrapolating ideas from the Founding era to the early twenty-first century' (p. 181).

Kindly offer a personal and critical reaction to Jeremy Waldron's assertion.

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On the final day of the comparative-law conference that took place in Reykjavik in May 2017, Professor Peter Goodrich asserted in forceful language that, whether as regards law reform, adjudication, or scholarship, foreign-law research can only enjoy a meaningful future as a credible intellectual, political, and legal pursuit if "the patronising dogmas of the truth […] give way to critical theories of the particular". For his part, a fellow panelist, Professor Hein Kötz, replied that "[s]cholars [...] have [...] only the ultimate goal of discovering the truth". He added: "Thankfully, [c]omparative law is an '*école de vérité*', a school of truth". The last word went to Professor James Gordley, who challenged Professor Goodrich in these bold terms: "Frankly, Peter, I cannot understand what you are saying because when I look at German, French, or American cases, I find that "[t]here [is] nothing distinctively German, French, or American about the [judicial] decisions themselves".

Kindly offer a personal and cogent reaction to this exchange of views by three leading comparativists.

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On 22 March 2017, in reply to Senator Ben Sasse (R-Nebraska) at his Senate confirmation hearing, Justice Neil Gorsuch said as follows: "[I]f we're talking about interpreting the Constitution of the United States, we have our own tradition and our own history. And I don't know why we would look to the experience of other countries rather than to our own when everybody else looks to us. For all the imperfections of our rule of law, it is still the shining example in the world. That's not to say we should sweep our problems under the rug or pretend that we've solved all of the problems in our culture, in our society, in our civic discourse. But it is to say that we have our history and our Constitution and it's by 'we the people'. And so, as a general matter, Senator, I would say it's improper to look abroad when interpreting the Constitution — as a general matter".

Kindly offer a personal and critical reaction to this statement.

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In his *Trust in Numbers* (Princeton University Press, 1995), p. 217, Theodore Porter articulates a standard understanding of objectivity in these words: "Objectivity is one of the classic ideals of science. It refers to a cluster of attributes: first among them is truth to nature, but there is also impersonality, fairness, universality, and in general an immunity to all kinds of local distorting factors like nationality, language, personal interest, and prejudice". For their part, holding the view that "[o]bjectivity, reason, and universality are, of course, the Crown jewels of our Enlightenment heritage", Daniel Farber and Suzanna Sherry respond to critiques of objectivity by offering what appears to be a more modest understanding of the term, presumably with a view to salvaging it as sound epistemic equipment. They thus write that "[o]bjectivity is the aspiration to eliminate beliefs based on bias, personal idiosyncrasy, fiat, or careless investigation". (These two quotations are from

D.A. Farber & S. Sherry, *Beyond All Reason* (Oxford University Press, 1997), pp. 28 and 27, respectively.) Meanwhile, within the field of comparative law Konrad Zweigert and Hein Kötz have been actively promoting both the virtue and the feasibility of "objective" research into foreign law. Kindly offer a personal and critical reaction concerning the merits of Zweigert and Kötz's commitment to objectivity in the light of Farber and Sherry's appreciation of the term. For instance, consider whether Farber and Sherry's definition could provide comparative law with a more serviceable and useful concept of "objectivity" than the classical apprehension (like Porter's) that Zweigert and Kötz appear to favour. Otherwise said, could comparative law benefit from retrieving and applying Farber and Sherry's seemingly more reserved understanding of objectivity?

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In his *Mémoires* (Paris: Galilée, 1988), p. 217, the late philosopher Jacques Derrida states in the following terms what he regards as the first rule that must govern the reading of a text: "[R]espect for the other, that is, for his/her right to difference" ("*[L]e respect pour l'autre, c'est-à-dire pour son droit à la différence*"]. Meanwhile, philosopher Alain Badiou maintains that "[cultural] differences hold no interest for thought" (*Ethics*, transl. by Peter Hallward [London: Verso, 2001 (1993)]), p. 26 ("*[l]es différences [culturelles] n'ont aucun intérêt pour la pensée*").

Making specific reference to comparative law and to the work of the comparativist as he/she interacts with foreign law (and indeed intervenes within foreign law), kindly offer a personal and critical reaction to these two excerpts.

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It has been argued that research into foreign laws — the practice known as "comparative law" — inevitably compels the researcher, or "comparativist", to face conflicts of interpretations across laws, which can ultimately be resolved only in terms of one's personal preferences, these necessarily manifesting themselves as the expression of the cultural prejudices that one inevitably embodies.

Having read this claim with the utmost attention, kindly make a **personal and critical** case **against** this proposition.

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In *United States* v. *Then*, 56 F.3d 464, 469 (2d Cir. 1995), Judge Guido Calabresi, concurring, making specific reference to the constitutional courts of Germany and Italy, maintains as follows: "At one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review, which — though different from ours in many particulars — unmistakably draw their origin and inspiration from American constitutional theory and practice. [...] These countries are our 'constitutional offspring' and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children".

A few years later, in "Against Foreign Law", 29 *Harvard Journal of Law and Public Policy* 291, 328 (2005), Robert J. Delahunty and John Yoo write that "European constitutional values are inappropriate for the United States. These values were developed because European governments enjoyed a different tradeoff between national security and individual liberties and economic prosperity. The United States, which has greater responsibility for keeping international peace and for guaranteeing stability in Europe, faces a different balance between the demands of national security and constitutional liberties".

In the light of these competing arguments, kindly explain whether in your view it is legal, legitimate, and pertinent for United States federal courts to refer to judicial decisions from European institutions in matters of constitutional adjudication.

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French philosopher Alain Badiou holds as follows: 'When one abdicates the universal, one gets universal horror' (A. Badiou, *Théorie du sujet* [Editions du Seuil, 1982], p. 197 ['*Quand on abdique l'universel, on a l'universelle horreur*']). Meanwhile, a U.S. historian of religions, Bruce Lincoln, takes the view that 'there are no true universals, save at a level of generalization so high as to yield only banalities' (B. Lincoln, *Apples and Oranges* [University of Chicago Press, 2018], p. 26).

Making specific reference to comparative law and to the work of the comparativist as she/he interacts with foreign law (and indeed intervenes within foreign law), kindly offer a <u>personal and critical</u> reaction to these two excerpts.

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In Uwe Kischel, *Comparative Law*, transl. by Andrew Hammel (Oxford University Press, 2019), p. 41, one can read the following passage: "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." Meanwhile, in Dennis Patterson, *Law and Truth* (Oxford University Press, 1996), pp. 181-82, one finds the following assertion: "[M]eaning arises from human practice and [...] no practice or discourse enjoys a privileged position vis-à-vis others."

Writing as a comparativist engaged in researching foreign laws, kindly offer a personal and critical reaction to these two statements.