Richard Hyland, *Gifts* (Oxford: Oxford University Press, 2009), pp. 63-74 & 94-113.

2. METHODOLOGY

102. *Controversial.* Because methodological questions are so controversial in comparative law, it is probably wise for every inquiry to begin by explaining its goals. An explanation is particularly useful here because gift law is in many ways unique.

A. COMPARATIVE LAW FUNCTIONALISM

103. *Common methodology.* Since the birth of modern comparative law in Paris in 1900, comparativists have focused much of their effort on debating how legal systems should be compared. Over the last several decades, however, despite a multitude of competing theories, many wide-ranging comparative studies have tended to follow one version or another of a much-discussed methodology. This method has been called functionalism,[1] a name that is seriously misleading, but which is convenient, for the moment, to retain. The method was developed by the students of Ernst Rabel during the 1930s, elaborated by Konrad Zweigert beginning in 1960, and ultimately presented in a provocative manner by Zweigert and Kötz in a short chapter in their important treatise.[2] One way to introduce the different methodology used in this study is to explore the incoherencies of comparative law functionalism.

The incoherencies, however, are not the end of the problem. It turns out that comparative law functionalism is not functionalism at all. Durkheim and other proponents of functionalist social science would have dismissed it out of hand. The problem is the confusion that reigns in comparative law between a subjective and an objective understanding of the central concept of function. Comparative law is not social science—it probably is not science at all—but it at least aspires to be a scholarly undertaking. It is therefore useful for comparativists to strive for the self-critical distance needed to avoid confusions that have long since been described and transcended in neighboring fields.

1. "There is general agreement about the basic methodological principle of comparative law. The basic methodological principle of comparative law is that of functionality." Mäntysaari 8.

2. Zweigert and Kötz 32–47. For a detailed analysis of the evolution of functionalism in modern comparative law, see Michaels. For related methodological suggestions in anthropology contemporary with Zweigert and Kötz, see Goldschmidt.

1. *Tertium Comparationis*

104. *Fundamental dilemma.* At the core of functionalist methodology is a particular approach to what has been presented as the fundamental dilemma of comparative law, namely the transition from description to comparison. Comparative law has always strived to provide accurate knowledge of foreign legal systems. Once the different systems are accurately described, it becomes immediately clear that, at least on their surface, they vary dramatically. Nonetheless, comparative law has always assumed that the different systems share important commonalities.[3] This assumption translates into one of the principal methodological questions of contemporary comparative law: how to descend from surface difference to the similarities that are assumed to be concealed beneath. Once the common features have been uncovered, a new goal emerges: to discover the role of law in modern society.[4]

105. *Common characteristics.* It was received wisdom in 1950s social science that comparison must begin by distinguishing between features common to all societies and those unique to each one. The thought was that the common characteristics, *nonculture-bound units* or *invariant points of reference*, once isolated, would anchor the comparative method.[5] It was assumed that two phenomena could be compared only in terms of the characteristics they share. Despite popular wisdom, apples can be compared to oranges in many ways—their culinary use, how long they hang on the limb before they drop from the tree, or the way they are represented in the European visual arts. Since the perspective chosen determines the understanding produced, the critical question for comparative law is how to establish the perspective from which different legal systems should be compared.

106. *Law and social problems.* Zweigert and Kötz made what at the time was a provocative suggestion. As their basis of comparison, they did not choose one of the law's internal characteristics, a feature that might be assumed to exist in all legal systems. Instead, they based comparison on the relationship they felt must exist between the law and society.[6] The two scholars argued that different legal systems are comparable because all legal norms are designed to fulfill a social function. Laws should be compared in terms of how they resolve the social problems they confront.[7]

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3. Mincke 320.

4. "The comparative method achieves fundamental importance only when it ceases to compare from the perspective of difference and focuses instead on commonality, for only then do we stand before a method for the general exploration of essence (*einer Methode genereller Wesensforschung*)." Mincke 320, quoting Rothacker 100.

5. Sjoberg 1–2.

6. Mincke 322–323.

7. Zweigert and Kötz 34. See also Mincke 323–324.

107. *What the courts do.* A second aspect of the functionalist system is an equally daring insight, drawn this time from legal realism, about how to ascertain the solution a legal system provides to a particular real-world problem. Every legal system is constructed as a hierarchy of norms. In code systems, for example, the statute is generally considered superior to case law.[8] Nonetheless, law is often compared as applied.[9] This is also required by the functionalist method. Functionalism is not interested in rules as such. It focuses instead on the solutions legal systems provide to practical problems. Those solutions appear only in the practical results of dispute resolution.[10] Functionalism thus abandons normative hierarchy and focuses instead on court decisions as the practical interface between the law and the extra-legal world. In other words, the tertium comparationis chosen by modern comparative law is the effective judicial response to common practical problems.[11] In their comparative studies, the world's leading comparativists have often adopted this approach.[12]

2. Common Problems

108. *Assumed similar.* The functionalist method assumes that societies governed by modern legal systems face common problems, and that these societies are similar enough for comparable situations to be arise frequently. "[T]he legal system of every society faces essentially the same problems ...."[13] Zweigert and Kötz state this assumption as a third element of their methodology, an assumption that, they believe, is obvious to everyone. They may have borrowed this aspect of their theory from functionalism in the social sciences. Radcliffe-Brown and Malinowski had been publishing similar ideas over the previous decades.[14]

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8. 2 Constantinesco nos. 62–66.

9. "The comparativist must determine the actual practical application of the legal rules." Mäntysaari 9.

10. "[A]t the end of the [nineteenth] century, jurists realized that they could only provide an exact description of a legal norm if they took into account the official interpretation of the courts, the only one that counts on a practical level." 1 Mazeaud (-Chabas) no. 99.

11. For the history of the tertium comparationis in comparative law, see 2 Constantinesco nos. 9, 25.

12. Direct comparison at the level of doctrine is out of the question, as the doctrines diverge very widely. A focus or basis for comparison can be found in the functional problems that the doctrine to be studied handles and resolves, in whole or in part, for its own legal system. Comparative analysis focuses on these problems, locating them in the systems under investigation and explaining the rules and principles through which they are handled and the practical results achieved.
Von Mehren 1010.

13. Zweigert and Kötz 34.

14. Any social system, to survive, must conform to certain conditions. If we can define adequately one of these universal conditions, *i.e.* one to which all human societies must conform, we have a sociological law. Thereupon if it can be shown that a

Both Zweigert and Kötz and the social science functionalists employ the notions of common problems and necessary conditions to explain social structure.[15]

"[T]he legal system of every society faces essentially the same problems ...." In a moment it will be useful to consider the remainder of that sentence, but for now it is worth conceding that the proposition seems plausible. Those who travel frequently learn to recognize the activities engaged in by individuals in other developed societies, even without special training in foreign languages or area studies. On most long-distance flights anywhere in the world, the flight attendants show us how to strap ourselves in, they ask what we would like to drink, and they bring us our meal. On arrival, we fill out a disembarkation form, show our passports to the uniformed officers in the glass booths, then stand around the carousel and wait for our luggage. Taxis are lined up outside the terminal, though perhaps they are not all painted yellow, or at least not the same yellow we are used to. At our hotel, we again show our passport, give an imprint of our credit card, and let the bellhop take our luggage up the service elevator. We take a nap between freshly pressed sheets, then go down and ask the concierge for a restaurant recommendation. As we wander through the unfamiliar streets, we recognize which establishments are bookstores, which are cafés, and which are elegant boutiques. We make a mental note about where we will be able to buy a pen and a notebook in the morning, we get a map of the public transit system, and we try our debit card in the ATM machine on the corner. We can easily find our sea legs in another contemporary culture. The small differences are even more intriguing because there are so few of them, and they seem threatened with extinction.

In the dispute about the functionalist method in comparative law, this element of the methodology has caused almost no one to think twice. Yet the obviousness of the proposition only serves to conceal the fact that it is wrong. By exploring this point in more detail, as will be done a little further on, it will be possible to discover why an alternative approach to comparing legal systems is necessary.

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particular institution in a particular society is the means by which that society conforms to the law, *i.e.* to the necessary condition, we may speak of this as the "sociological origin" of the institution. Thus an institution may be said to have its general *raison d'être* (sociological origin) and its particular *raison d'être* (historical origin). The first is for the sociologist or social anthropologist to discover by the comparative method.

Radcliffe-Brown (1935b) 297. Functionalism became the dominant theoretical perspective in American sociology during the late 1940s and 1950s. It dominated the field into the 1960s. Turner and Maryanski 114–115. Talcott Parsons's book *The Social System* was published in 1951.

15. Turner and Maryanski 113.

3. *Praesumptio Similitudinis*

109. *Presumption of similarity.* The final element of comparative law functionalism is its most famous, or infamous, aspect. Every comparativist recognizes that the legal discussions in different systems do not coincide. In some systems, certain questions serve as the focus for legal norms, scholarly discussion, and case decisions, whereas in other systems these questions are rarely asked and the answer almost impossible to find. For Zweigert and Kötz, this is mere appearance. If real-world problems must be solved in one system, those same problems must be solved in the others as well. If we find no relevant provision where we expect it in the code, we will certainly find a norm somewhere else, or a case decision. Zweigert and Kötz hypothesize, therefore, not only that legal systems in developed societies all confront the same practical social problems, but also that they will resolve those problems in a similar manner, though they may employ different doctrinal constructions. That is how the sentence quoted above concludes. "The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."

Zweigert and Kötz call their thesis the *praesumptio similitudinis*, the presumption of similarity.[16] They consider it a basic rule of comparative law. "[D]ifferent legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation."[17] To do comparative law, we must shift our focus away from legal concepts. "[T]he solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need."[18] The rule also operates as a method to check the accuracy of the results.

> [C]omparatists can rest content if their researches through all the relevant material lead to the conclusion that the systems they had compared reach the same or similar practical results, but if they find that there are great differences or indeed diametrically opposite results, they should be warned and go back to check again whether the terms in which they posed their original question were indeed purely functional, and whether they have spread the net of their researches quite wide enough.[19]

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16. Zweigert and Kötz 40. The Latin phrase is invented. I have found it in no classical source. In classical Latin, *praesumptio* usually means *presumption* in the sense of audacity. It would be better Latin to speak of a *conjectura similitudinis*.

17. Id. 39.

18. Id. 44. See also Kötz (1990) 209–210.

19. Zweigert and Kötz 40. I have slightly revised the translation.

110. *Universal legal language.* The final goal of comparative law functionalism involves an aspiration that may seem utopian, but which could be realized if enough comparativists uncover the functional foundation of enough institutions in enough legal systems. That goal is the discovery of a universal legal language, a conceptual scheme capable of comprehending all of the world's existing legal orders.[20] In other words, because the problems of modern societies are universal and because the role of the law is to solve those problems, the actual workings of the law will become clear as local doctrinal idiosyncrasies are discarded. Once all systems have been examined and a language universal enough to describe them has been developed, the essence of law in human society finally will have been understood. At that moment, functionalism will reveal itself as the scaffolding necessary for the construction of the pure legal language needed to portray the essence of the seemingly diverse institutions we know as the law.[21]

111. *Significant achievement.* In a world in which national legal training induces jurists to remain loyal to their native legal conceptions and convinces them to suspect ideas that arrive from abroad, the international scholarly agreement that comparative law functionalism has forged represents an astonishing achievement. Among other things, it permitted the world's leading comparative scholars to collaborate on an international encyclopedia that describes the private law of the world, an effort that reconnected legal systems after the Second World War.[22]

4. State of the Discussion

112. *Difference theory.* It is odd that it took so long for anyone to object to the functionalist vision. A critique was developed during the 1980s and 1990s.[23] One group of opponents, the difference theorists, criticized the focus on similarity and argued that there may be no level on which the differences between legal systems disappear.[24] Difference theory suggests that legal systems should be

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20. "The ideal would be reached when, in the end, a language was found capable of portraying every legal order. This would be a universal language of legal science. It would contain as basic elements all of the building blocks out of which the law is put together." Mincke 327–328.

21. In the activity of comparative description we glimpse a field in which legal science is fully autonomous and self-reliant .... The language elaborated by means of comparison ... is the basic language of legal science, one that alone is capable of portraying the legal material in its complete differentiation. It is formed exclusively from the material of the legal orders and reveals the building blocks out of which legal orders are composed.

Id. 328.

22. See International Association of Legal Science.

23. See, e.g., Frankenberg; Legrand; Hyland (1996) 187–192.

24. Hyland (1996) 193–197.

understood in their social context as expressions of an internally conflictual national culture, much in the way we understand literature, historiography, and philosophy.

113. *Moderation and tolerance.* As the debate progressed over the past decade, it produced a tolerance for diverse methodological approaches and efforts at reconciling the competing positions.[25] To begin with, functionalism now exists in a number of different versions.[26] Functionalists have reduced their claims and emphasized that the methodology is appropriate only when comparing legal systems in similar societies, and then only in fields not subject to strong moral or religious influence. Hein Kötz has also suggested that some of the most interesting differences are found in legal styles, techniques, and value judgments, aspects of the law that functionalism has traditionally ignored.[27] Difference theory has also been moderated to focus both on similarity and on difference in balanced proportions.[28] The consensus today is that no single methodology is appropriate for all comparative investigations. Instead, a new methodology will probably have to be developed for each project.

B. CRITIQUE

114. *Problems remain.* Despite the relative consensus, fundamental difficulties remain. The first is the frequent assumption that all developed societies confront the same problems. The second is the common belief that the law is essentially a mechanism to solve problems posed in the extra-legal world.

1. The Same Problems

115. *As confronted by the law.* One aspect of functionalist method continues as an assumption of many contemporary comparative methodologies. It is functionalism's third element, the seemingly innocent assumption that developed societies all face the same problems. This view has long since been rejected in the social sciences, even by functionalists. The social problems that functionalism believes the law is designed to address, the issues of practical life, are already shaped by history, culture, religion, and language—as well as by the legal tradition—before they become legal problems. A legal system can only confront the problems as they present themselves, and the actual problems differ dramatically from one society to the next.

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25. For a contemporary synthesis, see Husa.
26. Michaels distinguishes at least seven. Michaels 344–363.
27. Kötz 505.
28. Dannemann 406.

116. *Basic needs.* The deceptively simple example of the basic human need for food serves as an illustration. Everyone, every day, in every society has to eat. If there are universals across all times and civilizations, the daily meal has to be one of them. Comparative law functionalism operates with problems at this level of abstraction. However, no society, and no legal system, ever confronts food-related problems in this generic form.[29] If our need for food meant simply that we are required to introduce into our bodies the particular quantity of nutrients necessary to stoke the human machine, we would sit down at the next restaurant and order the first item on the menu. But that is not what happens.

If I am hungry and I find myself in front of a McDonald's, even if I am very hungry, I do not go in. I do not eat at McDonald's. Usually when I get hungry, I am looking for something specific. If I am in a city I do not know well, I look in a guidebook, or I simply walk down the street and examine the menus or look through the windows until I find the type of food I feel like eating. Though I am usually happy to have pancakes for breakfast and salad for lunch, I do not eat salad for breakfast or pancakes for lunch (though if I have not eaten for a couple of days, of course, I would eat whatever is put in front of me). I have been brought up to know what counts as breakfast and what counts as lunch, and I am powerless to change that. Though I know there is nothing logical or natural about it, I also know that, at this point in my life, it is much more than a preference. It is a part of who I am.

If food were just about fuel, there would be no eating disorders—no obesity, anorexia, or bulimia. We would eat what we need and then stop. There would also be no three-star French restaurants. No one would keep kosher, or fast during Ramadan, or be a vegetarian or fruitarian, or refuse to eat vegetables that grow at night or underground. Food would not be shipped from one continent to another, with all of the consequences, both foreseen and unexpected. The British craze for tea developed the teahouse, the tea break, and the art of porcelain. It also set the stage for the Boston Tea Party and thereby forged the unity of the colonies and the American Revolution.[30] In addition, it caused the British to begin importing opium into China, which not only provoked the Opium Wars but, through the destruction of the Chinese economy and the humiliation caused

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29. Nowhere and never will man, however primitive, feed on the fruits of his environment. He always selects and rejects, produces and prepares. He does not depend on the physiological rhythm of hunger and satiety alone; his digestive processes are timed and trained by the daily routine of his tribe, nation, or class .... The raw material of individual physiology is found everywhere refashioned by cultural and social determinism. The group has molded the individual in matters of taste, of tribal taboos, of the nutritive and symbolic value of food, as well as in the manners and modes of commensalism.

Malinowski (1939) 943–944.

30. Labaree.

by the treaty ports, also contributed significantly to the Chinese Revolution.[31] No issue, when conceived as a universal, is concrete enough to provide a basis for comparison.[32]

117. *Specific desires.* Another way to put the same point is that there is often no difference between the function and the means used to fulfill it. We do not first feel hungry, experience the need to consume a foodstuff, and then pick up whatever we find in front of us, whether sushi, or pizza, or a chocolate chip cookie. Instead we generally have an urge for some specific range of foods. All too often we decide to eat when we are not hungry and could easily do without the additional calories. Our generalized animal hunger and our specific desires are not even analytically separable. It is not meaningful to say that our craving for the cookie is just the form by which we seek nourishment for the body, because a chocolate chip cookie provides no nourishment at all. Due to its composition of white sugar, white flour, and fat, it is instead a slow-acting poison.

118. *Chocolate connections.* The example of chocolate illustrates how the consumption of a particular foodstuff is intimately connected to the rest of national and global culture. The European elite was enthralled with the chocolate they met as a rare and expensive import from the New World. After several centuries, the sweet rich taste has now become an element of popular culture, indeed a national addiction.[33] Chocolate leads a double life. As a product of highly skilled artisans, it serves as an elegant consumable, while it is also mass-produced as an element of the sugar culture. In this second form it contributes to obesity and type 2 diabetes, and thereby implicates questions of public education, medical care, and the federal budget. Chocolate is also a commodity for which free trade is sought by some and fair trade by others. It therefore raises difficult questions involving the international economic order, the International Monetary Fund, the World Bank, the future of the bottom billion, globalization, and the antiglobalization protestors. When the law addresses chocolate, these are some of the challenges to which it must respond. Chocolate is not just a food. It is a part of the intricate web of modern culture.

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31. Moxham 64–70.

32. Ralf Michaels, in his recent survey of functionalist methodologies, suggests that the universality of basic problems might be understood in a constructive rather than an empirical sense. Though the problems are not actually universals, they may be perceived as such. These constructed universals would serve as the *tertium comparationis.* Michaels 368–369. The problem with this suggestion is that whatever universals there may be in the abstract, whether constructed or empirical, do not present themselves to the various legal systems as such. They present themselves, and must be solved, in their specificity.

33. For the history of the consumption of chocolate in Europe and the United States, see Coe and Coe.

119. *Abstraction necessary.* Nonetheless, no comparison is possible without abstraction.[34] Comparison always requires putting some contextual aspects to one side. Yet comparison is meaningless if the evaluation is stripped of all situational context. In the field of history, comparativists start from the maxim "as little abstraction as necessary, as much concretion and contextual relationship as possible."[35] This is what Clifford Geertz meant when he wrote that "the comparative study of law cannot be a matter of reducing concrete differences to abstract commonalities ... it cannot be a matter of locating identical phenomena masquerading under different names."[36] The goal rather is to lift living organisms from their support systems, examine them briefly as their hearts continue to beat, and then, delicately, return them to their homes.

120. *Society specific.* A comparison of legal approaches to human food consumption should consider eating as an element of widely varying cultural situations. In other words, it would accept it in the multilayered form in which it presents itself to the law. Readers of the Hart and Sacks materials are familiar with the complex social, historical, and political factors that must be taken into account when the law attempts to organize something as basic as American commerce in fresh fruits and vegetables.[37] Legal process theory taught that rich contextual knowledge is essential to an understanding of the law. It is all too easy to forget that the circumstances prevailing at other times and places were very different. The problems the law faced in sixteenth century France, for example, were not those we face today. At the time, a villager might have been accused of witchcraft for giving a neighbor a loaf of bread or a wheel of cheese that the recipient feared was hexed or poisoned. A major social issue was the perceived excesses of dinner parties. Charles IX issued an edict mandating that no dinner, not even a wedding banquet, could include more than three courses (the entrée, either meat or

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34. "Phenomena cannot be compared with one another in their complex totality, as complete individualities, but always only in certain aspects. Comparison implies selection, abstraction, and separation from context." Haupt and Kocka 23.

35. Id. 23–24.

36. Geertz (1983c) 215–216. At about the same time that Zweigert was formulating comparative law functionalism, Geertz was writing the definitive critique of what Geertz called the "stratigraphic" conception, the view on which Zweigert's method is based.

> In this conception, man is a composite of "levels," each superimposed upon those beneath it and underpinning those above it .... Strip off the motley forms of culture and one finds the structural and functional regularities of social organization. Peel off these in turn and one finds the underlying psychological factors—"basic needs" or what-have-you—that support and make them possible. Peel off psychological factors and one is left with the biological foundations—anatomical, physiological, neurological—of the whole edifice of human life.

Geertz (1973c) 37.

37. Hart and Sacks 10–68.

fish, and finally cheese and dessert), each course could have no more than six dishes, and only one kind of meat would be allowed on each plate.[38]

In a celebrated article, Malinowski noted that a digging stick might be used not only for digging but also, in identical form and in the same or different cultures, as a punting pole, a walking staff, or a rudimentary weapon. "[I]n each of these specific uses the stick is embedded in a different cultural context; that is, put to different uses, surrounded with different ideas, given a different cultural value and as a rule designated by a different name. In each case it forms an integral part of a different system of standardized human activities. In brief, it fulfils a different function."[39] In other words, even the classical theorists of functionalism in the social sciences recognized that comparison focuses not on universals but rather on the way the element fulfills a social need within a specific cultural context.[40] "The direct motive for human actions is couched in cultural terms and conforms to a cultural pattern."[41]

What is true of tools is also true of legal norms. It makes no sense to tear them out of context in order to compare them. As Peter Winch has observed, the relation between ideas and their context is an internal one. "The idea gets its sense from the role it plays in the system. It is nonsensical to take several systems of ideas, find an element in each which can be expressed in the same verbal form, and then claim to have discovered an idea which is common to all the systems."[42] In other words, if the comparison of laws is possible at all, it can only occur by examining the norms as elements of particular social and cultural contexts.

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38. Davis (2000) 35–36; Edict of 1563.

39. Malinowski (1937) 625.

40. "The true comparative method consists of the comparison, not of one isolated custom of one society with a similar custom of another, but of the whole system of institutions, customs and beliefs of one society with that of another. In a word, what we need to compare is not institutions but social systems or types." Radcliffe-Brown (1948) 230.

41. Malinowski (1937) 629.

> [I]t is clear that in every human society each impulse is remolded by tradition. It appears still in its dynamic form as a drive, but a drive modified, shaped, and determined by tradition .... In the case of breathing ... [i]t is a well-known fact that even in European cultures, the emphasis on fresh air as against level of temperature is not identical in England, Germany, Italy and Russia. Another complication in this simple impulse of air intake to fill the lungs with oxygen is due to the fact that the organs of breathing are also, to a large extent, organs of speech. A compromise, an adjustment of deep breathing to performances in public oratory, the recital of magical formulae, and singing, constitutes another domain in which cultural breathing differs from the mere physiological act.

Malinowski (1944) 85–86.

42. Winch 100–101.

2. A Problem-Solving Activity

121. *A more basic assumption.* The assumption that the law confronts similar problems all over the developed world is in turn based on another, even more basic assumption, one that seems so obvious that it is never stated. The idea is that the law is primarily a problem-solving activity, that laws have the principal effect of solving, or attempting to solve, difficulties encountered by the extra-legal world.

Functionalist methodologies conceive of the law as in some way separate from the society it is designed to structure. They see society as a house in need of repair. We are the general contractors; the legal norms are our tools. The social problems come first. Legal norms are crafted to solve the problems.

But very often the law does not work that way. The norm comes first, and only then is a particular functionality ascribed to it. That function, however, is an imaginary attribution of an acceptable purpose, our attempt to justify our normative structure on rational grounds. The deeper problem with current functionalist methodologies is that they depend on a theory about the origin and function of legal norms that contradicts what we know about how the law works.

If the law were functional in the way legal functionalists assume, it would demonstrate two characteristics. First, we would know the purpose for which our legal norms are promulgated. Second, we would be able to determine the social consequences of applying the norms. Yet neither characteristic describes the legal systems examined here.

[...]

d. Comparative Notes

146. *Difficulties with functionalism.* The law governing the giving of gifts seems to be an area in which it is particularly inadvisable to ask questions from a functionalist point of view. Nothing seems to make much sense once the conversation turns to the purpose and effectiveness of these norms.

5. The Ambiguity of Function

147. *Emic and etic.* Perhaps the most serious difficulty with comparative law functionalism is the ambiguity at the core of its central concepts, *function* and *purpose*. The problem does not arise in the natural sciences. When biologists explain that the function or purpose of the heart is to circulate the blood supply, it is understood that they are referring to the heart's objective contribution to the functioning of the body. In the human sciences, however, function and purpose can be conceived either objectively or subjectively, from the point of view of either an outsider or an insider, from either the *etic* or the *emic* perspective.[127]

For example, when an anthropologist asks about the purpose or function of the Hopi rain dance, the answer depends on the perspective from which the purpose is judged. Hopi tribe members might say that they dance to convince the gods to send abundant rainfall. An outside observer might instead decide that the rain dance functions to reinforce group identity and ensure social cohesion. Sociologist Robert Merton, referring to this example, distinguished between a social institution's manifest or purported function, the conscious motivation of those involved, and its latent function or objective consequence.[128] The distinction had long been made by ethnologists.[129]

148. *Focus on the objective.* Rigorous functionalists in the social sciences focus on the objective side of this dichotomy, for they believe that "the real animus of

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127. "If behavioral events are described in terms of categories and relationships that arise from the observer's strategic criteria of similarity, difference, and significance, they are etic; if they are described in terms of criteria elicited from an informant, they are emic." Harris 340.

128. Merton 114, 118–119.

129. An example is Radcliffe-Brown's analysis of the function of dance among the Andamanese. "If an Andaman Islander is asked why he dances," Radcliffe-Brown noted from an emic perspective, "he gives an answer that amounts to saying that he does so because he enjoys it." Radcliffe-Brown (1948) 247. After describing the dance in detail, Radcliffe-Brown reached a conclusion about its social function. "In this way the dance produces a condition in which the unity, harmony and concord of the community are at a maximum, and in which they are intensely felt by every member. It is to produce this condition, I would maintain, that is the primary social function of the dance." Id. 252. In this setting, the individual dancer's perspective is not only accurate but actually essential to the dance's social function.

functionalism lies in the conception of function without purpose."[130] Functionalist social scientists are interested in the contribution institutions make to society as an ongoing system, independently of what the participants believe about those institutions. As Durkheim put it, "The determining cause of a social fact must be sought among antecedent social facts and not among the states of the individual consciousness."[131] Functionalists understand participants' beliefs as yet further components of the system, components that in turn need to be explained.[132] Moreover, there are often numerous etic theories. For example, economists and Canadian politicians considered the potlatch to be wasteful foolishness, whereas anthropologists saw in it a mechanism for maintaining social structure.[133]

Functionalists often have difficulty maintaining the proper focus. The language difficulty is fundamental. Language of purpose is taken from ordinary discourse and bent to serve objective analysis.[134] Moreover, it is easy to make the honest mistake of accepting the informant's subjective view as the ultimate basis of explanation.[135] The temptation is less serious when the manifest purpose of an activity, such as the Hopi rain dance, is to achieve a goal that natural science suggests cannot be achieved. But when the goal seems plausible, even experienced observers are less likely to ask about the institution's latent functions.[136] "Throughout anthropological literature there is confusion between cultural needs, which find their expression in vast schemes or aspects of social constitution, and conscious motivation, which exists as a psychological fact in the mind of an individual member of a society."[137]

Yet the distinction between the etic and the emic are crucial if functionalism is to succeed. The functionalist social scientist must "distinguish carefully between what the actor has in mind and what the social causes and consequences of his action may be, to keep separate always the point of view of the actor and the point of view of the observer. To the extent he cherishes certain goals or puts

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130. Kallen 524.

131. Durkheim 134 (the sentence is in italics in the original).

132. Such a reason as is produced by this process of rationalisation [among the Andamans] is rarely if ever identical with the psychological cause of the action that it justifies, yet it will nearly always help us in our search for the cause. At any rate the reason given as explaining an action is so intimately connected with the action itself that we cannot regard any hypothesis as to the meaning of a custom as being satisfactory unless it explains not only the custom but also the reasons that the natives give for following it.

Radcliffe-Brown (1948) 235.

133. Radcliffe-Brown (1940) 8.

134. "Such words as 'function,' 'disfunction,' 'latent,' 'needs' are treacherous for the same reason that they are handy." Davis (1959) 763.

135. Davis (1959) 765.

136. Merton 119.

137. Malinowski (1937) 629.

his analysis in terms of them and thus adopts the role of an actor, he loses the sociological level of analysis."[138]

149. *The etic in law.* A functionalist social scientist would carefully distinguish two facets of a legal system. The investigator would ask, first, about the goals that those who promulgate the norms seek to achieve—legislative intent and the policy reasons behind a judicial decision. The functionalist asks this question not because the answer will explain a norm's function, but rather to gather further data for functional analysis. A functionalist might ask, for example, how judges and legislators came to believe that the institution works as intended, much as one would ask a Hopi kachina dancer why the dancer believes that the dance actually might bring rain. However, when exploring the role legal norms play in a given social system, a functionalist would look exclusively at how those norms function. As Radcliffe-Brown noted, the method that is convenient for lawyers in their professional studies is not satisfactory for a social scientist, who must examine the role played by the law in maintaining a certain social structure.[139]

150. *Comparative law.* Modern comparative law, in contrast, has never experienced these difficulties. For the century of its existence, it has remained unaware of this distinction. Comparative law functionalists generally do not ask whether legal institutions might have objective functions that differ from the goals the lawmakers intend to achieve. In fact, many comparative lawyers, like many other legal scholars, assume that an institution's objective function corresponds to the goals those who create the norms are seeking to achieve.

151. *Purposivism.* For this reason, what is known as functionalism in comparative law is in fact not functionalism at all. It might more accurately be described as *purposivism.* It investigates how the institutions created by the various legal systems fulfill their articulated purposes. Purposivism does not distinguish between the emic and the etic. It assumes, as does the law itself, that human institutions fulfill the purposes their creators ascribe to them and that, as social purposes change, society purposefully alters its institutions to meet its evolving goals.

Purposivism has nothing to do with functionalism in the social sciences. In fact, social scientists have repeatedly explained that the method is not social science at all. Instead, a functionalist social scientist might suggest that comparative law purposivism demonstrates such a lack of self-knowledge, such a fascinating incongruity in an age of postmodern navel gazing, that it itself would require explanation.

152. *Law meets gift.* In the field of gift law, purposivism attempts to justify the legal restrictions imposed on donative activity. It seeks to explain why gift giving

138. Davis (1959) 765.
139. Radcliffe-Brown (1940) 8–9.

represents a problem for which a legal solution is needed. The assumption is that human beings, through their legislators, are able to structure social life as they see fit. In other words, purposivism understands gift law as another element of the traditional story that the law tells about itself.

Yet a moment's reflection makes clear that the law's perspective on gift giving has to be wrong. The world has many problems, but surely altruism is not such a major nuisance that it deserves the degree of attention it has received in the law of gifts. Many would conclude that favoring altruism might even represent the beginning of a solution. It is at this point that the emic perspective of comparative law reveals itself to be inadequate. Even a traditional purposivist might be surprised and begin to ask whether gift norms might serve some function other than the one legislative intent ascribes to them.

153. *Objective function.* When examined objectively, gift law does help resolve a problem, though it is not a problem gift giving presents to society. It is rather a difficulty gift giving poses to the law, for the gift threatens the law's conception of itself. The three Maussian gift obligations, despite the bewildering array of functions they appear to fulfill in different societies, seem to represent a basic pattern of human interaction, one that escapes legislative control. It might therefore be argued that, in contrast, the law's restriction of gift giving is designed to reinforce the conception of the individual that provides the foundation for modern law, the marketplace, and microeconomics. The foundation of all those activities is the rational actor who maximizes utility by increasing profit and reducing expense.

The law correctly recognizes that gift giving is subject to a different dynamic. The gift is an autonomous institution that no legal system can domesticate. This much was clear to the Canadian government when it prohibited the potlatch. Legal systems usually integrate such institutions into society by recharacterizing them as legal concepts. But gift giving to some extent refuses to be subsumed under traditional legal categories. And it suffers the consequences. Modern legal systems tend to prohibit what they cannot integrate.[140]

154. *Inferiority.* Gift giving offers a glimpse of a different world, one that serves as a reminder of the artificiality and, in a sense, inferiority of legal norms.

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140. As Halliday indicated, Canadian potlatch legislation was actually designed to eradicate Indian culture.

> A very large percentage of the Indians to-day are not of pure Indian blood, but have a large admixture of white blood, and, as one can imagine, it is not the better class of white men who have thus degraded themselves by intermingling with the Indian women, so that the result morally is not so great as the result physically. However, it will hasten the time when the Indians as such will be no more, but will be absorbed into the white race, and will help to carry the burden that so far has been borne by the white man for his benefit.

Halliday 226–227.

The norms that actually govern the giving of gifts are customary. They are almost universally followed, even though they are not sanctioned by the state. The simple existence of these customary norms threatens the foundation of the law, because it makes clear that society is structured by norms that do not depend on legal enforcement. It raises the question of how many customary norms would be followed irrespective of legal sanction, and the further question of whether society would really degenerate into a war of all against all in the absence of Leviathan. If the law that governs the giving of gifts proves to be largely unnecessary, it might well be asked just how much of the rest of the law is superfluous as well.

In other words, in its encounter with gift giving, aspects of the law reveal themselves to be guarantors of the conceptual foundation of life in the market. In the encounter between these two elemental social forces—the law and the giving of gifts—gift giving seems relatively harmless when compared to the extraordinary scope of the limitations imposed on it in many legal systems. If a legal system tends to prohibit what it cannot understand, the limits of legal understanding are obviously of great consequence to society. It is therefore useful to note those moments when legal norms seem to adopt the point of view of the market.

At this point, the methodological and the substantive preoccupations of this comparative study meet. Actually, they do not just meet. Eerily, they fuse. Gift giving challenges the law in the same way that it challenges the story legal scholarship tells about the law. There is thus no way to explore the interaction between the law and the giving of gifts without questioning the understanding that much of modern Western law has of itself.

C. AN INTERPRETIVE APPROACH

155. *Alternative to purposivism.* This study departs from the tenets of purposivism. It takes instead an interpretive approach to the comparative examination of the law of gifts. The hope is that this approach makes it possible both to avoid the difficulties of the traditional method and to discover something of the meaning of the law that governs the giving of gifts.

1. Social Science Functionalism and Comparative Law

156. *Functionalism in the social sciences.* Once it becomes clear that social science functionalism differs dramatically from comparative law purposivism, it might be asked whether an authentic functionalism might provide a workable method for comparative law research. It turns out, however, that functionalism, as it has evolved, has abandoned its rigorous goals and now provides little more than a useful intuition.

a. Critique of Functionalism

157. *Constant critique.* Functionalist methodology arose implicitly in the course of a number of influential ethnographic studies conducted at the beginning of the

twentieth century. Though the method was not formulated systematically, the ideas, often discussed in short articles, were fully developed by the 1930s.[141] From the beginning, functionalism was the object of criticism, sometimes even invective.[142] The critique of functionalism has generated many of the more recent social science methodologies. In fact, the university course on social science methodology frequently begins by rehearsing the failings of the functionalist method.[143]

Functionalism has been criticized for failing to take account of history, change, and conflict, as well as for a conservative, perhaps even reactionary, bias.[144] Functionalism has been described as the social science methodology that corresponds to the machine age, "with its impersonal automatic engines in continuous action; the tremendous acceleration of the tempo of life by the industrial establishment; the adoption of 'efficiency,' 'service,' 'progress' and the like as measures of value in the community."[145] More importantly, it has been argued that, even once an institution's functionality is fully described, nothing is thereby explained. Functionalists and neofunctionalists have in turn defended the method.[146] There is no reason to rehearse this dispute here because, in the end, very little is at stake. The functionalist method has long since been reformulated to remove the sting of most of these criticisms, but only at the price of becoming a commonsense, heuristic device that yields little in terms of methodological focus.

b. Merton's Reformulation

158. *Three postulates.* In his seminal article on functionalist methodology, Robert Merton summarized the three fundamental axioms of the functionalist method, and then, after demonstrating their defects, he reformulated the method as a heuristic tool.[147] An examination of these axioms, together with their Mertonian reformulations, makes clear how little is left of functionalism as a discrete method.

In Merton's view, functionalism postulates, first, that society is a functional unity. Each societal element is integrated into the total structure with enough

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141. See Radcliffe-Brown (1935a); Malinowski (1939). Somewhat later, Radcliffe-Brown famously declared that the functional school never existed. It was "a myth invented by Professor Malinowski." Radcliffe-Brown (1940) 1.

142. For a more or less contemporary critique, see Gregg and Williams. For a response, see Radcliffe-Brown (1949).

143. "There is one theoretical approach that every undergraduate in the social sciences is quickly taught to dismiss: 'functionalism.'" Mills 326.

144. "If what the Western world has now in the way of institutions is 'functioning, active, efficient' the outlook is dim indeed." Gregg and Williams 602.

145. Kallen 524.

146. For citations to the principal critiques, defenses, and compromise proposals, see Camic 693.

147. Merton 79–91.

harmony and consistency to prevent irresolvable conflict. Second, functionalism assumes universal functionality. Every social custom, material object, and idea fulfills a social function. Finally, functionalism presupposes that all institutions are indispensable. Every social institution is functionally necessary for the society of which it is a part.[148]

159. *Doubts.* It took Merton only a couple of pages to demonstrate that these postulates are mistaken. Even from a commonsense perspective they seem rigid and excessive. Yet it is important to recall why orthodox functionalists, even if only implicitly, adopted these postulates for their ethnographic studies, and it is even more important to make clear the consequences of rejecting them, as we will be forced to do. These three postulates provide the necessary deductive framework for rigorous functionalist analysis. As long as it can be assumed that societies function as systemic wholes and that each of their elements fulfills an indispensable function, social scientists are justified in assuming that, when they encounter a social institution, no matter how odd it may seem, that institution plays some useful role. If any of the postulates does not obtain, rigorous functionalist analysis becomes impossible.

Difficulties already surface in biology. We know that certain elements of the body serve no useful purpose. Examples include nipples on male mammals and, to borrow an example from Holmes, the cat clavicle. As far as the social sciences are concerned, there is no way to prove or disprove the functionalist postulates. In the end, some will believe them, others will not. The buttons on the sleeve of a man's suit jacket provide a good example. Whether they serve a function, such as maintaining a connection to tradition, or are a simple atavism is a question of judgment and preference—or a question of the definition of the term *function.*

In the end, it does not matter. Once it becomes clear that we cannot be certain whether any particular social institution actually has a function, then functionalism is demoted to a heuristic suggestion.[149] It stands today for the proposition that we should try to find functions for the social institutions we investigate. As Kingsley Davis explained in a now-classic essay, functionalism, properly understood, simply restates the fundamental goal of all social science, namely to

148. Because the views of the functionalists continued to evolve in response to criticism, Merton chose to delineate the view of an ideal functionalist. For example, although Radcliffe-Brown maintained his view that a social system is a functional unity, Radcliffe-Brown (1935a) 397, he retracted his belief in the functionality of every custom. Early in his career, he argued that "Every custom and belief of a primitive society plays some determinate part in the social life of the community, just as every organ of a living body plays some part in the general life of the organism." Radcliffe-Brown (1948). (Radcliffe-Brown began work on the book in 1908–1909, but it was not published until 1922.) Some years later he rejected the idea as a "dogmatic assertion" and decided instead that it was enough to assume that every institution *may* have a function. Radcliffe-Brown (1935a) 399.

149. Turner and Maryanski 119–120.

understand how society works, and therefore to reflect on how different social institutions function.[150]

160. *From observation to explanation.* The goal of functionalism is explanation. Every attempt at explanation must make a difficult transition from description of the data to more general statements that link the data in causal relationships. Though functionalism encourages a playful speculation about the roles social institutions may fulfill in society, it offers no suggestion on how to move from description to explanation; neither does it tell us how to distinguish explanations that are useful from those that are not. *Les guides rouges* and *les trois macarons*, the Michelin restaurant guides with their three stars, may serve the function of making restaurant choice more convenient and informed; of maintaining French dominance in the culinary arts; of promoting Michelin brand tires; of generating celebrity status for chefs; of diverting attention from serious social problems by reaffirming our collective fascination with talent, ambition, and fame; of contributing to restaurant segregation in terms of wealth and class status; or they may serve none of these functions. Functionalism provides no insight into how any suggestion can be considered more accurate than any other. Yet to the extent a scholarly undertaking strives for explanation, criteria have to be available.

c. Functionalism and Comparison

161. *Incompatible with comparison.* Functionalism has generally proven to be incompatible with comparison. In anthropology, for example, the triumph of the functionalism of Malinowski and Margaret Mead led to the decline of the comparative method.[151] Malinowski believed that general laws of social and cultural practice could be elaborated from the functional observation of a single tribe.[152] In the end, functionalists rely, as Boas put it, quoting Bastian, "on the appalling monotony of the fundamental ideas of mankind all over the globe."[153]

Once anthropologists became convinced that the correct functional analysis of any individual society uncovers general principles of social organization, the comparative method proved unnecessary. In fact, the elimination of difference transformed anthropology into a matter of public interest. General laws of social development were obviously more interesting than the curious customs and beliefs of strange peoples. "The fact that many fundamental features of culture are universal, or at least occur in many isolated places, interpreted by the assumption that the same features must always have developed from the same causes, leads to the conclusion that there is one grand system according to which mankind has developed everywhere; that all the occurring variations are no more

150. Davis (1959).
151. Ackerknecht 117.
152. Id. 122–123.
153. Boas (1896) 901.

than minor details in this grand uniform evolution."[154] In the context of comparative law, Zweigert and Kötz, following the same path, supplemented their functionalist method with the presumption that the practical effect of the norms is everywhere the same. Yet if culture, including legal culture, is everywhere the same, it is difficult to understand why anyone would engage in comparative studies.

2. Imagined Worlds

162. *Purpose and purposivism.* "Many a gallant knight has gone forth to do battle with the functional dragon," Martin Orans has written, "only to see him slip away and continue his mischief."[155] The problem has always been that it is remarkably difficult to find something coherent to put in its place.

a. Purpose in Law

163. *Fundamental fact.* The place to begin, perhaps, is to delineate those aspects of purposivist methodology that can be retained. Whatever the problems with the purposivism often involved in the contemporary study of comparative law, it remains our purposivism. It has been a regular feature of the past century of comparative law scholarship. The central concept of purposivism—the attribution of purpose to the norms—accurately reflects a main preoccupation of every legal system. There is no reason to abandon it merely because it has been abused. The attribution of purpose to the norms remains a fundamental fact of the law, and there is much to be learned from focusing our attention on it—not as a solution, but rather as an element of the law that deserves study.

The principal problem with purposivism is that it accepts that the meaning and function of the norms are those proposed by the jurists who create and interpret them. For this reason, the point of view of the jurist has only rarely become the object of comparative study. Yet the purposes legal actors seek to advance are largely imaginary. Jurists construct for themselves a world—sometimes the world as they would like it to be and sometimes as they fear that it is—they imagine the impact they would like to have on that world, and then they create, apply, and interpret the norms so they might have the intended effect.

When examined in this way, it becomes clear that the work of the law is to draw from the imagination.[156] Legislators imagine the society they are called on to regulate based on the information gathered through legislative hearings and expert reports. They *read* these facts from the particular perspective they bring to

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154. Id. 904.

155. Orans 312.

156. "[T]he 'law' side of things is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real." Geertz (1983c) 173.

their position. Their observation, most observation, is prestructured by theory.[157] So the world for which they design their regulations is a fictional construct. One lawmaker might believe that our world is threatened by illegal drugs, radical activists, same-sex couples, undocumented workers, and terrorists, whereas another will see a world threatened by global warming, multinational corporations, world hunger, and the AIDS epidemic. One will see a world that rewards hard work, whereas another will see a world in which ruling elites monopolize power and reduce everyone else to a position of subservience. Every legislative enactment implies a view of the world. Legislation is therefore an act of the imagination.

Judges are engaged in a similar process. Before deciding their cases, many judges try to determine, often by simple intuition and personal experience, how the decision in the case will affect society, the consequences it will have for those who are not at the moment before the court. They might hope to encourage safety and reduce accidents, or they might instead feel it more important to give social actors the widest reasonable range of conduct. In either case, their decisions are based on their vision of the world and on the role they imagine that their decisions will play in it.

In their opening and closing arguments, common law trial lawyers contend that their clients have acted appropriately while their opponents have erred. Every law review article implies a vision of what the world is like and how the law should be organized to function within it. In the American law school classroom, we present these worlds to our students. Many of those involved in creating these worlds engage in no empirical observation or other fact-finding. Most of the time, these constructions are based on elements gleaned from legal training and extra-legal belief.

b. The Proper Role of Purpose

164. *The influence of cultural factors.* The vision legal actors have of the world is accessible through the statements they make about the purpose of the norms. When unpacked, the purposes carry with them a vision both of the world and of the role of the law. In other words, purpose is the key to understanding the law, provided it is held up to the light and examined as the object of study.

Purpose serves another salutary function as well, which is to bring into focus the role of cultural factors in the law. The law as an official enterprise does its best to conceal the role of background assumptions. It attempts to justify the norms in terms of objective social necessity. Legal realism drew attention to the fact that judges do not simply apply legal norms but instead evaluate all of the facts and circumstances. But even realism is restrictive, for it suggests that facts and circumstances can be objectively evaluated. The law, however, is enmeshed in the web of cultural understanding of which it is a part. The notion

157. "[N]ormal science ... [is] a strenuous and devoted attempt to force nature into the conceptual boxes supplied by professional education." Kuhn 5.

of purpose—actually the law's competing purposes—provides access to the role of culture in legal decision making.

165. *Vanishing the law.* There is one final disadvantage in the way purposivism deals with the purposes it discovers in the norms. It manages the remarkable and entertaining feat of making the law disappear. (Some might argue that is not a disadvantage.) What I mean is that purposivists do away with the law as the object of study. Purposivism sees the law as a tool to achieve the law's purposes, as the instrument social volition employs to achieve change. Once the law is conceived as a simple instrument, it disappears into the wings. It is hard to imagine a bridge engineer who would take the bridge for granted and focus instead on the development it has facilitated across the river. Yet that is what comparativists have often done. The fundamental flaw of purposivism is that it is not interested in the law. From the purposivist perspective, the norms themselves are expendable. The law is transparent, obvious, unimportant. Only the law's purposes and effects are worth studying.

3. From Explanation to Interpretation

166. *Internal relation.* There is no doubt that the goals and purposes as legal actors envision them must play a role in comparative law. The law is what Max Weber has described as *meaningful action*, human behavior inspired by a subjective sense of meaning.[158] It would be impossible to make sense of most social relations without taking into account the ideas that inspire them.[159] What we compare, therefore, when we compare legal systems, includes not only statutes and case holdings but also the reasoning that explains those results, the explanations provided by legal actors about what the norms are designed to accomplish. "[T]he social relations between men and the ideas which men's actions embody are really the same thing considered from different points of view."[160] In other words, there is an internal relation between the law and its justifications.

The problem with purposivism is not that it considers purposes, but rather that it assumes that a norm's social function coincides with the purposes legal actors ascribe to it. We can avoid this problem by understanding both the norms and their purposes as elements of a wider cultural framework. There is nothing new to this. Common-law scholars have long understood the law in this way.

What is needed, however, is a justification for this broad approach, a reason to consider the law not only as a normative force but also as a cultural manifestation, both as an intervention in social life and as an expression of the culture in

158. 1 Weber 4. For Winch's interpretation of this Weberian concept, see Winch 42–48.

159. Winch 22.

160. Id. 113.

which it is embedded. The elements of such a theory have long been in place. Little more is needed here than to enumerate them.

a. The Nature of Law in Comparative Law

167. *Where to find the law.* To begin with, to the extent we focus on purpose, we place adjudication at the center of legal theory. The task of determining the purpose of the norms is, in large part, entrusted to the courts. As indicated above, courts in many jurisdictions apply norms not merely by interpreting the text of the law but also, and principally, by making a judgment about how society should be structured.[161] Comparativists have generally agreed that the norms to be compared are not those found in the statute books but are rather the norms that result from the case holdings. Thus, when a comparativist speaks of the law, what is often meant is the law as applied. Such an understanding of the decisions requires an investigation of the social context of the norms and the goals the judges believe they are pursuing. For these purposes, the internal resources of the law—the statutes, the case precedents, and the like—are insufficient to constitute a field of study.

168. *No logical deduction.* In this perspective, then, the case holdings do not represent logical deductions from preexisting principles. In other words, from one typical comparative point of view, the norms do not preexist the dispute. Instead, these comparativists study how judges use their understanding of the law and the facts to formulate holdings that are appropriate to the cases. Judges often consider the appropriate role of the courts, the proper respect for precedent and tradition, the extent to which the law should coincide with social custom, the equities of the case in light of the applicable criteria of value, the evolving needs of society, and the kind of society that the judge would prefer. As a result, judicial decisions cannot be said to be true or false. A judicial decision, in H. L. A. Hart's insightful phrase, is *ascriptive* rather than *descriptive*: it ascribes to the parties responsibility for the actions they have taken.[162]

b. Reading the Law

169. *A coherent pattern.* One challenge for comparative law is to make sense of the countless acts of individual judges as they decide disputes, create legal norms, and, by doing so, intervene in social reality. The goal is to find a coherent pattern in the mass of decisions. Paul Ricoeur has suggested that intentional social activity, whether the writing of fiction or the creation of legal norms, can be understood

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161. As regards the common law, this is a relatively uncontroversial proposition. I believe that it also applies to adjudication in the civil law. Many civilians would contest this. Though there is no room here for a theoretical proof, much of this book is devoted to demonstrating that civilian court decisions, at least in the field of gift law, cannot be explained solely by reference to the codes.

162. Hart 171, 182.

by recourse to the techniques of interpretation that are usually applied to the understanding of texts.[163] The paradigm of reading treats society like a text, which means as a holistic process. Moreover, the text is plurivocal. When taken as a whole, it permits different readings and constructions. Though authorial intent, both the intent of the novelist and the intent of the judge, may be taken into account, it does not determine the meaning of the text.[164] Intent is simply an additional datum that may be used in the interpretation process.

In this perspective, the goal of comparative law would be to interpret the meaning of the text that is constituted by the multitude of judicial decisions. To grasp this pattern, we are justified in taking into account all of the law's elements. The text in question is not any actual legal text. It consists rather of all the elements of the life of the law. This includes judicial opinions and statutes, scholarly articles and perspectives, efforts at law reform, the practitioner's point of view, and the customs and practices of those whose behavior the law seeks to regulate. These elements, when taken together, can be read as a collective—though often internally inconsistent—expression of a particular vision of the role of the law in society. In sum, comparative law considers the law—including the myriad statements made by legislators, judges, and scholars about the purposes and meaning of the norms—as a collective fabric of justification.

170. *Focus on the law.* The benefit of the interpretive method, when compared to purposivism, is that it refocuses attention on the law. For this study of the law of gifts, for example, it 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. There is no need to consider beforehand the extent to which that world is real or whether the norms have any particular effect or function.

c. Law as an Element of Culture

171. *Meaning embodied in symbols.* The final step in elaborating an interpretive method for comparative law is to grasp a particular legal system as an expressive element of a larger cultural context. Clifford Geertz has similarly suggested that the rituals and activities of clan-based societies may best be understood as elements of a cultural whole, each one symbolizing a web of signification. Culture thus understood is "an historically transmitted pattern of meanings embodied in symbols."[165]

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163. Ricoeur.

164. Id. 549.

165. Geertz (1973d) 89. "The culture of a people is an ensemble of texts, themselves ensembles, which the anthropologist strains to read over the shoulders of those to whom they properly belong." Geertz (1973b) 452.

172. *Benefits and pitfalls.* Geertz's work provides a useful example of both the benefits and the pitfalls of the interpretive method. Geertz's goal was to explore meaning rather than provide explanation.[166] Of course, other anthropologists, including some functionalists, have occasionally looked at culture in this way,[167] but Geertz relied on it to the exclusion of all else. If comparative law were to follow this tradition, it would seek to decipher and explicate the symbolic web in which legal norms are embedded.[168]

To develop this idea further, it is useful to examine the methodological contribution of Geertz's celebrated essay on the Balinese cockfight, together with the scholarly criticism his essay has generated. It turns out that comparative law is uniquely able to avoid the difficulties Geertz's critics have found in his work.

i. The Interpretive Method

173. *Thick description.* Geertz described his ethnographic method as *thick description.* For purposes of a comparative study of the law of gifts, the idea is easily summarized. The method abandons the project of attempting to determine the function gift law plays in society. Gift norms are therefore not to be explained in causal terms as necessary responses to imperative social needs. The question shifts instead to the symbolic significance of the norms. Their symbolic meaning can be elicited only when the norms are described in their full contextual richness. The goal is to understand what a particular legal system's gift norms indicate about that culture's vision of the role of the law in the giving of gifts. In other words, the question is not what the norms do but rather what they mean.

174. *Neither emic nor etic.* Geertz applied this interpretive method in his essay on the deeper meaning of the Balinese cockfight.[169] Geertz did not try to understand the cockfight from the point of view of a Balinese villager. Geertz's perspective was neither emic nor etic. He formulated concepts unavailable to the Balinese themselves that allowed him to explore what the cockfight symbolizes to the Balinese and how it relates to other manifestations of Balinese culture.

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166. Geertz (1973e) 5.

167. This Yin-Yang philosophy of ancient China is the systematic elaboration of the principle that can be used to define the social structure of moieties in Australian tribes, for the structure of moieties is ... one of a unity of opposing groups, in the double sense that the two groups are friendly opponents, and that they are represented as being in some sense opposites, in the way in which eagle hawk and crow or black and white are opposites.

Radcliffe-Brown (1951) 21.

168. Schneider 810.

169. Geertz (1973b).

175. *Symbol creation.* For Geertz, the cockfight was a symbol of the *deep play* he believed is at work in Balinese society.[170] The cockfight is essentially an opportunity for gambling, but the stakes are so irrationally high that the principal participants constantly run the risk of financial ruin. To explain the rapture with which Balinese men participate in this activity despite these risks, Geertz suggested that the cocks represent both their owners and their owners' clans and thereby provide a mechanism by which social tensions are displayed. In other words, the Balinese fascination with cockfighting is due to the way it displays fundamental passions in Balinese society that are normally hidden from view and thereby both symbolizes and comments on status difference and hierarchy.[171] The cockfight is "a Balinese reading of Balinese experience, a story they tell themselves about themselves."[172] They tell themselves that they exist as Balinese on two levels, on the level of external calm and collective solidarity and on a deeper level that involves a desperate striving after status. The constant repetition of the event provides the Balinese with a means to experience personally and ever anew this significant aspect of their culture.

ii. The Challenge

176. *Not objective.* Geertz's method has often been challenged.[173] One frequent criticism is that Geertz relied so heavily on his imagination that there is nothing objective about his construction.[174] Geertz manages to make sense of puzzling phenomena by weaving them into a broader fabric, but, because it is not a fabric woven by the natives themselves, there is no way to judge whether the interpretation is valid.[175] When the Balinese engage in the cockfight, for example, they do not do so with the purpose of communicating, whether consciously or otherwise. It is Geertz who conceived of the event as a text. He configured the cockfight, a nonlinguistic cultural event, as textual, as communication open to interpretation, and then hypothesized that the text encodes information that reveals the deepest nature of Balinese sensibility.[176] But there is no way to know whether the cockfight expresses a symbolic principle of Balinese life or rather whether it masks an inconvenient social reality.[177] In other words, Geertz's use of the textual approach is purely speculative. In the words of Mark Schneider,

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170. For an interpretation of Geertz's text, see Schneider 814–820.

171. Geertz (1973b) 443–444; Roseberry 1018.

172. Geertz (1973b) 448.

173. For brief surveys of the critique and citations to the principal critical literature, see Sewell 35–37; Swidler 301; Schneider 836 note 4.

174. Schneider 811.

175. Shankman 263.

176. Schneider 825.

177. Shankman 268.

one of Geertz's most insightful critics, Balinese culture became a text for Geertz without ever having been one for the Balinese.[178]

William Roseberry, another critic of Geertz's work, takes seriously the metaphor of the text. He notes that Geertz's interpretive method sees culture as an art form but neglects the process of its creation.[179] The fact that culture is created means that some members of society have more influence than others over the statement it makes. To understand a text means first to ask who is doing the writing. Symbols, like literary texts, can transcend context and authorial intent, yet, as Borges taught, it meant one thing to write *Quijote* at the height of the *Siglo de Oro* and something very different for Pierre Menard to produce it in the 1930s.

177. *Challenge.* Geertz's work thus presents more of a challenge than a solution. Geertz relied so heavily on the assumption that the phenomena under investigation represent an organic whole that he could not avoid attributing to all such phenomena "an integrity and profundity normally reserved for art, for those intentionally symbolic phenomena that are commonly seen as 'wholes' or 'totalities.'"[180] The real meaning of Geertz's work, as Schneider has perceptively explained, is to challenge us to recognize those cultural efforts that seek to impose meaning on human existence while preserving our understanding that culture is an inconsistent pattern of diverse, and at times mundane, phenomena that often cannot reasonably be construed to produce insight.

d. Comparative Notes

178. *Inscribed meaning.* The goal of the textual approach, as Robert Darnton has explained, is to grasp "the meaning inscribed by contemporaries in whatever survives of their vision of the world."[181] As far as this comparative study is concerned, the immediate goal is to read the gift law of each legal system as a meaningful whole. Gift norms are examined in the context of the purposes a system's jurists imagine for them, the world as those jurists understand it, and the effects the norms are believed to produce. Of course, the gift law of any society forms an integral part of the private law, of the entire legal system, and, beyond that, of the rest of each society's culture. Unfortunately, it is not possible to pursue all these connections in the limited space accorded to a study such as this one.

179. *Speculation risk.* Due to the law's methodological lag, the criticism of Geertz's work, namely the speculative nature of his interpretations, has not yet found its way into the law. As a result, legal scholars commonly explain aspects of a legal system as expressive of a particular vision, even when the legal sources

178. Schneider 812.
179. Roseberry 1022.
180. Schneider 826.
181. Darnton 5.

themselves make no mention of those ideas. Due to its unsystematic nature, the common law is particularly susceptible to this type of interpretation. For example, Richard Posner argues that the common law of gifts follows notions of efficiency, even though the common-law courts almost never mention efficiency or related concepts.[182] Beginning from a different vision, James Gordley believes that the Aristotelian principle of equality best explains modern American gift law.[183]

180. *Close contact with the sources.* One way to avoid speculation is for the investigation to remain in close contact with contemporary sources. To the extent the study references the pronouncements made by the participants themselves, the meaning that emerges is less likely to be speculative.

The object of cultural study is not to be found in an informant's unspoken subjectivity but is rather what is publicly available as symbols[184]—the inscription in writing, the fixation of meaning.[185] In this regard, modern law provides a more hospitable field for the application of the interpretive method than do the clan-based cultures studied by anthropologists. In comparative law, the raw material is easily available. In modern legal systems, the purposes the norms are thought to achieve are publicly announced. When the legislature fails to state its goals, the courts attribute purposes and elaborate the social policies that serve as the foundation for their decisions. Legal scholars put the norms into context, fit them into a system, and describe how the system is supposed to operate. In this interpretive effort, legal scholarship appears as one the law's voices and not merely as a secondhand report about something that is happening elsewhere. Therefore, there is no reason to keep it at a distance, as is suggested by the traditional comparative methods.[186] The law's resources also include pleadings, motions, depositions, and letters of counsel. Jury deliberations and legal advice are shielded by confidentiality, but they nonetheless often find their way into print. Practitioners are constantly making reform suggestions. Geertz himself noted that the comparative study of law should focus on the various mechanisms

182. "I do not argue that economic analysis can explain every rule and outcome, but only that it gives structure to, and suggests a fundamental economic motivation for, the general legal approach in this area." Posner (1977) 424.

183. Gordley (1995) 548. "A thesis of this Article is that the 16th century jurists [of the Spanish natural law school] had the best explanation of the way American law enforces [donative] promises." Id. 570.

184. Swidler 299.

185. Geertz (1983a) 31.

186. "The comparativist may not rely without scrutiny on the opinions of the domestic scholars. Domestic scholarship sometimes fails to recognize essential elements. At times the authors remain imprisoned in their own theories and tend to defend them at any price." Mäntysaari 10. See also 2 Constantinesco no. 60.

available for the creative interpretation of the law.[187] This study of gift law treats the different voices in each system as a single text.[188] Though gift law is frequently incoherent and internally contradictory, there is implicit agreement on the basics of the discussion, which is what I take to be the meaning of the law.

181. *Attention to detail.* Due to the critical importance of the sources, comparative studies require ceaseless attention to detail. A comparative study that paints with a broad brush provides the reader with no means to gauge the accuracy of the account. The efforts made in this study to adhere closely to all variety of texts yields what, in most contexts, would rightly be considered an excessive number of references at the bottom of the page. The goal is simply to ensure that interpretation remains faithful to the meaning of the law of gifts in contemporary society.

182. *Traditional in the law.* It is worth emphasizing that the law has long been familiar with the interpretive method. In *The Death of Contract*, for example, Gilmore examined the consideration doctrine as a symbol of the Holmesian conception of contract. Gilmore examined the world as Holmes imagined it, the purposes Holmes imagined for his rules, and the vision that emerges from the doctrine when read as a text. Gilmore attempted, as Geertz did, to demonstrate how we are suspended in webs of significance that we ourselves have spun.[189] Gilmore showed that a particular vision of law generates an ethos that both makes that particular worldview seem true and that, at the same time, makes the ethos seem realistic, given that we believe we live in a world of that kind.[190]

183. *The goal here.* This study is not concerned with whether gift norms achieve their stated purposes. The goal is rather to grasp the symbolic significance of the gift for the legal imagination. A number of difficulties arise when attempting to operationalize this project. The first concerns the choice of standpoint. In Geertz's view, laws should be compared by examining one system through the lens of another.[191] This method is not helpful for gift law, since none of the

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187. "[T]his imaginative, or constructive, or interpretive power ... upon which the comparative study of law ... should, in my view, train its attention ... is there—in the method and manner of conceiving decision situations so that settled rules can be applied to decide them (as well, of course, of conceiving the rules), in what I have been calling legal sensibility." Geertz (1983c) 215.

188. In a similar manner, Lynn Hunt, in his study of the French Revolution, treated the utterances of the various revolutionary politicians as constituting a single text. Hunt (1984) 25. As Hunt later explained, the method can be justified only if it succeeds. Hunt (1989) 17.

189. Geertz (1973e) 5.

190. Swidler 299.

191. "[A] comparative approach to law becomes an attempt ... to formulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another." Geertz (1983c) 218.

approaches can be termed neutral. The minimalist German system may appeal to some more than the baroque system elaborated in the French Civil Code, but to choose one over the other would mean disregarding some legitimate concerns from the outset. The arcane and amorphous constructions employed in the common law are particularly ill-suited as a baseline. Nonetheless, the gravitational pull of the common law has been so strong that I have constantly fought against the temptation to present all systems from its point of view, and my efforts have not always been successful. Another difficulty is the bias the law itself brings to the regulation of gift giving. I have tried to resolve these difficulties by constantly shifting the standpoint. At times the focus is on the discussion about a given topic in a particular system and its relationship to the system's premises. At other times it seemed helpful to isolate each system's distinctive voice. In some cases I step outside the law and examine the legal approach from the perspective of social practice.

These difficulties converge when the time comes to choose a conceptual framework for the presentation. I have tried to maintain analytic distance by using concepts that do not coincide with those of any one legal system. Yet there seems to be no way to divide up the subject matter without prejudicing the analysis. Each system tells a story about gift giving, and each story has the feel of an organic whole. There are common elements to the stories, but when they are teased apart and compared, the rhythm of each individual tale is lost. Lévi-Strauss teaches that there is only one solution to this problem. In *Tristes tropiques* and his *Mythologies* cycle, he pieced aspects of different cultures together and created from them a larger narrative, an enduring mythos. On a much more modest scale, that has also been the goal here.

184. *Substance and method.* Here again substance coincides with method. The functionalist and the interpretive methods are each adopted to different understandings of social life, and therefore different aspects of the law. The functionalist method claims to offer a rigorous method for explaining social phenomena. An explanation is considered valid if it uncovers human rationality as the principal motor behind the maze of cultural phenomena. Rational purpose is often understood in terms of utility maximization.[192] Comparative law purposivism follows the functionalists along this path.

On the other hand, theories of gift giving from Mauss forward have argued that the most meaningful aspects of social interaction do not maximize individual utility in an economic sense. Those who accept theories such as Mauss's have little alternative but to adopt a method that focuses on meaning rather than utility.

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192. "The individual who makes up functionalist society might have stepped from any economics text. He is a rational creature and (under whatever social system) ceaselessly pursues his own self-interest, scrupulously avoiding pain and seeking pleasure." Gregg and Williams 596.

Balinese gambling, the distribution of piles of blankets at a Kwakwaka'wakw potlatch, Mother Teresa's work in Calcutta, Dan Ellsberg's decision to publish the *Pentagon Papers*, the decision to write fiction that will never make money and probably will not even be published, all of this is irrational when judged from the standpoint of utility maximization, and yet these remain examples of the most meaningful gestures found in human culture.

185. *This study.* This study examines how major Western legal systems imagine goals for themselves, how they develop and apply their concepts, and how they use their thoughts about gift giving as a means to discover their own premises and convictions. The giving of gifts provides a challenge to the law. Based on that challenge different legal systems imagine different worlds of meaning. The purpose of this study is to explore these different worlds.

Noted Publications

PIERRE LEGRAND

This section introduces recent publications — predominantly books or articles — deemed worthy of note by comparatists-at-law. It deliberately ranges widely. Readers are invited to bring suggestions for inclusion to the attention of the editor. Presentation of a text here does not pre-empt a fully-fledged review elsewhere in the journal.

Hyland, Richard. *Gifts*. Oxford, Oxford University Press, 2009. 708 pp. ISBN 978-0-19-534336-6.

As comparatists-at-law know (and as the Hamburg-based endorser on the book's jacket appears to have forgotten), the author's is not the first wide-ranging modern text on the law relating to gifts. Indeed, John Dawson's 1980 *Gifts and Promises* stands as a distinguished predecessor, which the author graciously acknowledges even as he finds Dawson's enterprise fundamentally flawed (78-85). But the project at hand is more ambitious than Dawson's, both as regards approach and in terms of coverage. Arguably, the author's *Gifts* is, in fact, two books.

The first text, a monograph which fills less than 10 per cent of the whole, consists in a succinct theoretical excursus on the fabrication of comparative legal studies. For its part, the second narrative, very much a textbook in the classical mould (although undoubtedly situating itself at the higher end of classicism), offers a detailed exposition of the legal treatment of gifts in various jurisdictions. While the focus is mostly European (Belgium, England, France, Germany, Italy and Spain), the list of selected countries includes the United States and India. There are references to other laws also. By way of illustration, the sub-section featuring a comparative survey of definitional issues (129-31) includes 'sound bites' on Swiss, Greek, Austrian, Dutch, Hungarian, Polish, Czech, Latvian, Albanian, Argentine, Brazilian, Ecuadorian, Lebanese and Syrian laws, not to mention the laws of Japan, Nepal, Congo and Burundi, although these appear by way of footnote citations only. (Inevitably, such a stupendous range of references invites one to ponder the question of *competence*, whether in legal/cultural terms or, more specifically, from a linguistic standpoint. I return to this theme below.)

To begin by addressing the bulk of the monograph (the 'second' book), the author does a good job of convincing his readers at the outset that the way in which the law regulates gifts raises issues worthy of their interest, not least because, as he observes, 'the legal mind so often concludes that gift giving is a danger to society'. After all, he adds (disclosing more than a hint of his anglophone background), '[p]rivate law is formulated for the market-related activities about which it is chiefly concerned'. Accordingly, '[i]t

has often proven incapable of grasping the fundamentally different social dynamic that governs gift giving'. As the author also remarks, again in a somewhat characteristically common-law vein (to his credit, he acknowledges the strength of 'the gravitational pull of the common law' in the course of his research), '[f]rom the point of view of the quid pro quo that defines the law's prototypical transactions, giving something away for nothing is an inexplicable event' and '[w]hoever engages in it is either incompetent or misguided — and in need of legal protection'. Indeed, the disjointure between 'law' and 'gift' strikes the author as being so pronounced that in the last paragraph of his text he is moved to refer to these two domains as 'largely incommensurable fields of human activity'. As this brand of comparativism goes, the author's rendition of the various laws that he has made into his object of study appears to me to be dependable, cogent and clear (not insignificant qualities, I hasten to add). In many instances, the text is humorous. And on more occasions still, it is impressively insightful — not least when the author brings to bear historical, linguistic or anthropological input. But this particular practice of comparison — which, in terms of the knowledge being identified as relevant and the information being deemed worthy of transmission, must be located on the hither side of the orthodox paradigm most famously illustrated, albeit at a lesser level of sophistication, in the leading text of Konrad Zweigert and Hein Kötz — has to contend with inherent limitations.

Despite the author's sustained efforts and his overall massive word product, the fruit of many more years of labour than most of us would find ourselves able to endure, the accounts of the diverse laws under consideration are necessarily in the form of more or less extensive summaries which, just as necessarily, are always already inadequate if only because of their obsolescence, as the author himself readily accepts in his preface (xx). And since the comparative surveys being developed throughout the book are based on those very reports, they too suffer from important liabilities. In sum, anyone in need of information about the formalities pertaining to the execution of gifts in Germany, the matter of consent as regards organ donation in India or the conditions under which gifts can be revoked in France, will find a measure of satisfaction in this text — enough, say, to make a good investigative start. And so will anyone wishing to be introduced, for example, to Jacques Derrida's philosophy of the gift and Pierre Bourdieu's sociological interpretation of the act of giving. Unfortunately, in the same way as the execution of a gift promise made without the required formalities in German law is considered over two pages of text only (347-49), the gift of a life insurance policy in the US is treated in ten lines (434), and the topics of gift acceptance in India and of the revocation of a gift due to the birth of a child under Spanish law are addressed in just over a page each (491-93 and 558-59, respectively), Derrida's views are compressed in three sentences and Bourdieu's thoughts reduced to one paragraph — which, in fact, largely consists of a quotation from him (52). What I am saying, in effect, is that the application of the 'puddle principle' simply cannot be circumvented: any expansion of the puddle over a greater surface will lead to a reduction of puddle depth. Having wanted, despite his disclaimer (120), to embrace so many laws and so many disciplines, the author has had to compromise on the profundity of the analysis of every law and of every discipline.

Although I am in awe of the author's dedication (he informs us that he devoted 20 years of his life to this intellectual endeavour), of his interdisciplinary proclivities and of his verve, I claim that comparativism favouring range of coverage over depth is structurally doomed to the production of information of equivocal pertinence. In a nutshell, I would have resisted the inclination for globetrotting-at-law which marks the

text, and I would have positioned myself at the opposite end of the author's spectrum. Specifically, I would have devoted the entire study, for instance, to the law of gifts in India with a view to unconcealing at length the historical, philosophical, religious, economic, social, psychological and epistemological traces that haunt the statutes and the judicial decisions in that country. Being the work of someone for whom Indian law is not 'his' law (as if law belonged ...), this text would have been thoroughly comparative. To be sure, even such a focused narrative would prove unsaturable (which means that not everything could ever be said about the topic), but it would provide an infinitely more satisfying yield than the extensive enumeration of epigrams — some admittedly longer than others — for which the author decided to settle. It could be said, tongue only slightly in cheek, that the author has remained too close to the Max-Planck Institute, the wealthy promoter of the *International Encyclopedia of Comparative Law*, which, as was aptly observed, epitomises the 'telephone-book' conception of comparative analysis of law (Ewald, W (1995) 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' 143 *University of Pennsylvania Law Review* 1889 at 1983).

But, as I mentioned at the beginning of this review, the author's text is not just about the law of gifts for it also offers a vade-mecum on comparative research where he defends what I think are very important ideas indeed (thus reminding his readership that the contacts he made in the course of the preparation of his text were not confined to colleagues in the *Hansestadt*). Crucially, the author thus insists on how '[his] goal has been to provide data to those who think about the differences between the civil and the common laws, data that can be used to support their theories and criticize the theories of others' (xx). As a comparatist who has been arguing that the traditional obsession with similarities across laws within the field of comparative legal studies is fundamentally misguided and indeed crucially deleterious, I can only rejoice that the author would want to distance himself so clearly from the orthodox mindset. But there is more subversion on offer as *Gifts* makes a persuasive case against what it calls the 'incoherencies' of the functionalism by which mainstream comparatists have been abiding — which, as the author notes, is 'in fact no functionalism at all' but something along the lines of 'purposivism'. Although remaining, in my view, far too charitable vis-à-vis the field's errant functionalists (he refers to the aforementioned *International Encyclopedia* as 'an astonishing achievement', while I rather tend to apprehend it as a meta-hurdle on the way to defensible comparative practice), the author correctly reminds us that, *pace* functionalist propaganda, 'actual problems differ dramatically from one society to the next', that '[i]t makes no sense to tear [legal norms] out of context in order to compare them', and that 'if the comparison of laws is possible at all, it can only occur by examining the norms as elements of particular social and cultural contexts'. In sum, the author notes how '[f]unctionalism has generally proven to be incompatible with comparison.'

What, then, is the author's suggested alternative? In his words, comparativism must adopt an 'interpretive method' Drawing extensively (and critically) on the late anthropologist Clifford Geertz, the author emphasises that his goal is 'to discover something of the meaning of the law that governs the giving of gifts'. Law, he writes, is not only a 'normative force' but also a 'cultural manifestation'. '[A]ll the elements of the life of the law', not simply 'actual legal text[s]', require consideration such that comparatists can 'decipher and explicate the symbolic web in which legal norms are embedded'. For the author, it is important, however, that interpretation does not turn into speculation (108-11). According to him, it is key that 'interpretation remains faithful to the meaning

of the law of gifts in contemporary society'. To that end, the author does not hesitate to deploy specific strategies allowing him to remain 'in close contact' with local sources of law. Hence his 'ceaseless attention to detail'. Hence also his valorisation of the 'inscription in writing' of 'one [of] the law's voices', namely legal scholarship — which the author indeed solicits extensively throughout his study (although with a discernible predilection for established texts). To my mind, it is beyond doubt that the author's hermeneutic comparativism stands as a substantial advance over functionalism. In this regard, he is to be saluted for helping to take comparative research out of the epistemological quagmire where the orthodoxy within the field continues to hold it. Having said this, hermeneutics raises its own difficulties. I shall confine myself to one issue having to do with meaning.

The author would have the comparatist's interpretation 'remai[n] faithful to the meaning of the law'. Such a formulation suggests the existence of something like 'the meaning of the law' to which interpretation must then 'remai[n] faithful'. Now, is this schematisation not problematic? Is there indeed 'the meaning of the law' out there, waiting for the arrival of its interpreter whose task would then be limited to a process of retrieval and subsequent duplication for analytical purposes? Is it not rather the case that whatever goes under the name of 'meaning' (as in 'this is the meaning of that text') is in fact a construct that has been fabricated by the interpreter out of the materials that he deems available to him and that he selects for interpretive purposes? It would follow that any ascription of meaning — including any ascription of *legal* meaning — is unavoidably autobiographical, no matter how disturbing such an assertion may prove to the comparative *doxa*. It would also entail that if 'truth' is to retain any semantic purchase, it could only be as an equivocal or plural notion. Unfortunately, the author's cursory treatment of the matter does not allow for any sustained exploration of these questions (111).

In the end, this monumental study, in the author's own terms, 'seeks to demonstrate that, despite its efforts over the past two millennia, the law has been unable to tame the social practice of giving'. He sees his work as 'a continuation by other means' of the theoretical investigations on the resilient social practice of giving by such distinguished anthropologists as Marcel Mauss and Bronislaw Malinowski — fine company indeed. Yet, although I would urge my postgraduate students to emulate the author's differentialism, I would press them to move beyond comparative-legal-studies-as-juxtaposition-of-posited-laws.