

Interdisciplinarity: Can Film Studies Contribute to Comparative Legal Studies?

Geoffrey Samuel*

Abstract

Has film studies anything to offer comparative law? The idea that film studies might contribute to comparative legal studies will no doubt be met with some skepticism. Such skepticism is not unreasonable, especially given what some might consider, possibly wrongly, a rather weak theory tradition associated with cinema studies. However, over the last decades, there has been movement in legal studies—and not just with respect to comparative law—towards epistemological attitudes that extend well beyond the theories and methods that once dominated legal thought. The aim of this chapter is to therefore investigate the possibility that a comparison between film studies and comparative legal studies might be fruitful.

I. Introduction

A general investigation of the contribution film studies might make to legal reasoning has already been undertaken where two theories or approaches were seen as having epistemological relevance.¹ These were reception theory and representation theory. This present contribution will not return to these theories and instead will be more wide-ranging in its scope: it will look at the way film writers often compare, or seemingly compare, one genre with another or one film with another. In addition, it will examine various notions that have given rise to literature in cinema studies—for example, narrative structures, style, orientalism, pastiche and nostalgia. Could such comparisons and notions contain lessons for the comparative lawyer? Such a question immediately raises issues concerning the epistemology of law and the problem of epistemology in the realm of comparative law. In examining film studies alongside law, is one not dealing with two forms of knowledge that are so different that any comparison will, at best, produce very weak insights? This is a real danger, but hopefully one that can be avoided, resulting in some more solid comparative conclusions.

However, before discussing the principal issues of comparison in film studies and law, something must be said about the kind of academic writing found in both disciplines. The aim here is largely descriptive—that is to say, the aim is to stress in an informative manner the differences and similarities between the types of scholarship that are typical. Very broadly, the question is this: what is it to have knowledge of law and of film studies? One way of attempting to answer this question is, of course, to look at the curricula in

* Professor Emeritus, Kent Law School, University of Kent (g.h.samuel@kent.ac.uk).

¹ Geoffrey Samuel, *Rethinking Legal Reasoning* 197-228 (2018).

university faculties or departments. But the type of academic writing can equally provide important insights. This said, the knowledge question itself will not be the focal point of the present contribution. The emphasis will be more orientated towards issues that are, as will be argued, relevant to law and to comparison itself. The argument will be that film studies can contribute to an understanding of a range of issues that are relevant to the epistemology of law and to comparative law.

II. Knowledge and Writing

How might one begin such a comparison of knowledges? One way is to look at introductory textbooks; such works usually aim to provide an overview of the discipline in question and to identify some focal points that will be of concern to students learning the subject over the years to come.² Particularly, there is likely to be some focus on methodology and perhaps even on an outline of the major relevant theories. As in many subject domains, there are different types of writing about law. There are articles and reports of cases or other legal events in the media where the objective is largely to inform, but such pieces may also carry the author's opinion and critique. The kind of scholarly writing to emerge from law faculties takes various forms. Perhaps the traditional view was set out by Herbert Jolowicz:

Modern text-books are important . . . as guides to the case-law with which they are concerned. But if they are good they are more than mere guides, for they seek not only to arrange the cases systematically but to extract from them the general principles of the law and to show how those principles may be developed. And the same is true, on a smaller scale, of articles in the Law Reviews. Whether acknowledged by the judges or not—and the tendency of judges to acknowledge their indebtedness to legal writers is increasing—opinions stated in text-books and in learned articles are often adopted in the courts and there given the force of law. To deny persuasive authority to text-books today may be to state the formal position in England quite correctly, but it is to conceal the substantial and increasing importance of la doctrine in the formation of English law.³

It has to be said at once that Jolowicz was writing well over sixty years ago and, as is evident, was talking primarily about the common law. Today academic writing, or some at least, is much more influential. There is also far more debate today, stimulated in part by research assessment exercises, about what constitutes good academic scholarship. Nevertheless, the Jolowicz approach was still being defended in 1996 by some law academics;⁴ and, as we shall see, neo-formalism is making something of a comeback today. As for the civil law, the principal source of law is codes and other legislative academic work, particularly textbooks. Such sources participate not just in a description of what the law *is*—if such a thing is actually possible—but equally in its systematization and coherence.⁵ The codes have constructed the knowledge but the professors continually maintain and re-construct

² Qu'est-ce qu'une introduction au droit? (Rémy Cabrillac ed., 2017).

³ H.F. Jolowicz, *Lectures on Jurisprudence* 314-15 (1963).

⁴ See the contributions by Peter Birks and Gareth Jones in *Pressing Problems in the Law: Volume 2: What Are Law Schools For?* (Peter Birks ed., 1996).

⁵ See Philippe Jestaz & Christophe Jamin, *La doctrine* (2004); *Histoire des manuels de droit* (Anne-Sophie Chambost ed., 2014).

(to a certain extent) through their writing while at the same time, often in notes and articles, adding a critical perspective. Their method is described as dogmatic, which has been summarized as follows:

The dogmatic approach consists . . . in reproducing, categorizing, putting in order and systematising the law. Three principal results are expected: a) a manifestation of law as a unitary system complete and coherent in itself; b) classifications and categorizations created according to logical criteria (exhaustiveness, absence of overlap, and non-contradiction); c) the formulation of concepts and principles which reflect “the totality of the legal order being studied” in such a way that they permit the resolution of any type of case.⁶

All of this is trite knowledge to lawyers and jurists, but is repeated here to act as a comparative framework for a brief discussion of the kind of knowledge that forms the basis of cinema studies. One might start by saying that the difference between kinds of writing is more pronounced in this field because cinema, as popular entertainment as well as artistic culture, has attracted different levels of attention. Nearly every form of media contains film reviews and sometimes more generalized kinds of writing that might, for example, cover various genres such as the Western, musical, horror and (or) detective thriller. Indeed, there is a very long tradition of film reviewing that predates the elevation of film to the level of an academic discipline taught in universities. As Timothy Corrigan writes:

The review is the type of film analysis most of us are chiefly familiar with, since it appears in almost every newspaper. Normally, a review aims at the broadest possible audience, the general public with no special knowledge of film. Accordingly its function is to introduce unknown films and to recommend or not recommend them. Because it presumes an audience that has not seen the movie it discusses, much of the essay is devoted to summarizing the plot or placing the film in another context (the director’s other work, films of the same genre, etc.) that might help the reader understand it.⁷

However, the level of critique in such reviewing can vary from a reviewer’s personal reaction to whether or not she likes the movie to an analysis that is scholarly in its dissention of the product; and so it would be misleading always to draw a distinct frontier between reviews and academic writing.⁸

Viewed from the position of the university faculty or department, Corrigan identifies the theoretical essay, which he says “is at the other end of the spectrum.”⁹ He continues:

Such an essay often supposes that the reader possesses a great deal of knowledge about specific films, film history, and other writings about film. Its target audience, often advanced students or people who teach film, is usually very knowledgeable about the movies.

⁶ Véronique Champeil-Desplats, *Méthodologies du droit et des sciences du droit* 87 (2d ed. 2016) (quoting Antonio Hernández Gil, *Metodología de la ciencia del derecho* 128 (1971)).

⁷ Timothy Corrigan, *A Short Guide to Writing About Film* 7 (3d ed. 1998).

⁸ See e.g., the work of the late Ronald Bergan. Ronald Bergan Obituary, *Guardian*, July 28, 2020 (<https://www.theguardian.com/film/2020/jul/28/ronald-bergan-obituary>).

⁹ Corrigan, *supra* note 7, at 9.

Its aim is to explain some of the larger and more complex structures of the cinema and how we understand them.¹⁰

Between these two spectrums, Corrigan identifies a third kind of writing which he calls the critical essay. Here, the “focus of the essay is far more specific than that of the review, since the writer hopes to reveal subtleties or complexities that may have escaped the viewers on first or even second viewing.”¹¹ For example, says Corrigan, a good critical argument about a particular film might begin “by placing the film in the context of other critical and scholarly views,” the author then announcing his aim before moving “from an analysis of character and acting style to some general conclusions about how to understand this style.”¹² This kind of writing is particularly important at an academic level. There are whole books written by university film scholars on particular movies. Indeed, the essence of this type of critical writing is well encapsulated in the publisher’s description of Raymond Durnat’s final book devoted to Alfred Hitchcock’s *Psycho*:

In spite of the widespread acknowledgement of Hitchcock’s and his collaborators’ achievements on *Psycho*, its complexity and sophistication as cinema aren’t fully appreciated. In this book Raymond Durnat shows the extent of the achievement. In a minute analysis of the film he explores all the elements that make up this remarkable film. In addition he develops various lines of argument—about spectatorship, Hollywood narrative codes, psychoanalysis, editing and shot-composition, among other themes—that will change the way we analyze cinema.¹³

As for the curriculum in a university film department,¹⁴ Corrigan identifies six approaches. These are film history, national cinemas, genres, auteurs, kinds of formalism and ideology.¹⁵ Sarah Casey Benyahia and Clair Mortimer, in their short guide for film students, also stress film history within which they include genre theory (the Western, the horror film and so on) and screen theory.¹⁶ The latter is “an overarching name for a range of important theoretical developments which have had a significant impact upon the development of the academic study of film.”¹⁷ The two authors then add two further sections, namely studying the film text, and film as a contemporary discipline, within which they include narrative and audience theories and, under contemporary discipline, film as identity and postmodern and cultural studies. When one compares this curriculum with one in a law school there are immediate differences, but also some overlap with regard to theory. Postmodernism and cultural studies have certainly entered the language of legal scholarship and, more generally,

¹⁰ Id.

¹¹ Id. at 10.

¹² Id. at 12.

¹³ Raymond Durnat, A Long Hard Look at “Psycho” (2002), back cover.

¹⁴ For a brief account see Film Studies (https://en.wikipedia.org/wiki/Film_studies).

¹⁵ Corrigan, *supra* note 7, at 78-90.

¹⁶ Sarah Casey Benyahia & Clair Mortimer, *Doing Film Studies: A Subject Guide for Students* (2013).

¹⁷ Id. at 55.

there is a huge literature on legal theory.¹⁸ This theory is likely to be of a very different nature than theories of cinema, but feminism and Marxism, for example, might well be found in both domains. Unsurprisingly, legal history has a long tradition.¹⁹ Yet a law student can obtain a law degree without ever having studied legal history and legal theory, and many might graduate without any understanding of what is meant by postmodernism or even cultural studies. What is interesting about comparative law, were it to be studied by an undergraduate or postgraduate, is that postmodernism and culture would probably be important focal points; and it is most unlikely that legal history would be ignored.²⁰ At a general level, therefore, one lesson that film studies might have for legal education is whether a focus on what the law is—on positive law courses—has resulted in a university faculty or department which has little or nothing to offer other knowledges within academia.²¹

III. Concepts and Categories

Another similarity between law and cinema studies is the importance of concepts and categories. “Film theory,” writes Brian Price, “is to be distinguished from the practice of criticism and historical research insofar as it concerns itself with the creation of concepts.”²² If one compares this view with legal theory, such a statement would probably have been true of law during the latter part of the nineteenth century up until the middle of the twentieth century. Early works on jurisprudence focused considerably on legal concepts.²³ However, this changed in the United Kingdom during the second half of the twentieth century, when the emphasis moved away from legal concepts towards theories about the nature and concept of law itself.²⁴

What, then, is a concept? Price defines a concept as “representational because what it stands in for, in nearly every case, is something that cannot otherwise be seen.”²⁵ For him,

¹⁸ For something of an overview, see, e.g., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules L. Coleman et al. eds., 2004). For an excellent history of legal theory up to 1939, see J.W. Jones, *Historical Introduction to the Theory of Law* (1940).

¹⁹ For something of an overview, see, e.g., *The Oxford Handbook of Legal History* (Markus D. Dubber & Christopher Tomlins eds., 2018); *The Oxford Handbook of European Legal History* (Heikki Pihlajamäki et al. eds., 2018).

²⁰ See, e.g., Mathias Siems, *Comparative Law* 115-63 (2d ed. 2018); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 74-84, 132-42, 180-204, 218-37 (3d ed. 1998).

²¹ Mathias Siems, *A World Without Law Professors*, in *Methodologies of Legal Research: Which Kind of Method for Which Kind of Discipline?* 71 (Mark Van Hoecke ed., 2011).

²² Brian Price, *Concept*, in *The Routledge Encyclopedia of Film Theory* 104, 104 (Edward Branigan & Warren Buckland eds., 2014).

²³ See, e.g., G.W. Keeton, *The Elementary Principles of Jurisprudence* (1949).

²⁴ One book on legal theory (jurisprudence) that reflected both the past preoccupation with legal concepts and the future preoccupation with theories about the nature of law is R.W.M. Dias, *Jurisprudence* (5th ed. 1985).

²⁵ Price, *supra* note 22, at 106.

it must be “both singular and general; singular, insofar as it is decidedly different from other concepts—other possible relations that may well involve some partial aspect of any other concept—and general, since it must also describe something that can contain more than one instance.”²⁶ He distinguishes concept from category through the example of the notion of film noir. Is it an exclusive category whereby for inclusion a film must meet, say, certain identifiable criteria? The problem here is that there are films which may well meet the criteria but cannot be described as only a film noir. If it is a concept, then it “allows us to collect instances and to see something on the basis of shared partiality.”²⁷ This distinction between category and concept makes much sense when dealing with a phenomenon like film noir or, indeed, many other movie genres. As Price says, there are certain identifiable criteria—one of which is a particular style—yet these criteria are often problematic. Can the style of film noir really be defined or even described in a way that will exclude a film that contravenes in some way the style from being a film noir? Take two films based on a short story by Ernest Hemingway and carrying the same title.²⁸ The 1946 version of *The Killers*, directed by Robert Siodmak, is often seen as a paradigm film noir given its monochrome expressionist photographic and scenic style plus the narrative of a doomed individual, brutally killed by contract killers at the beginning of the movie. And who, one subsequently learns, was betrayed by a femme fatale. In Don Siegel’s 1964 remake there is the same plot structure, but this time set against a style of 1960s corporate America, slightly seedy motor-racing track life and wealthy suburbia. Siegel manages to create a genuine “noir” atmosphere by the use of color and architecture, rather in a way that Alfred Hitchcock did in some of his 1950s films. Visual grimness—a “noir” atmosphere—can be evoked by a style that not only does not conform to the paradigm 1940s expressionist monochrome but actually is almost directly opposed to it. Yet it would be extremely difficult to argue that Siegel’s *The Killers* is not, conceptually, a traditional film noir (if the last one).²⁹

Does any of this thinking have relevance for legal thought? The first reaction of the jurist might well be to say that Price’s view of theory, concepts and categories is relatively weak and has little to offer legal theory. In fact, one might say, it has nothing to offer jurists since what is normally required of a legal concept is a rigorous and objective definition to guarantee legal certainty.³⁰ It is however interesting to note that the distinction between concepts and categories identified by Price with respect to film noir is a distinction also found in law. Legal concepts and legal categorization are different: the law of property, for example, is a category, while ownership and possession are two concepts within the category. As for definitions, jurists—except perhaps the Roman jurists³¹—have constantly

²⁶ Id.

²⁷ Id.

²⁸ See Serge Chauvin, *Les Trois Vies des Tueurs: Siodmak, Siegel et la fiction* (2010).

²⁹ But cf. Paul Schrader, *Notes on Film Noir* (1972).

³⁰ Jean-Louis Bergel, *Théorie générale du droit* 229 (5th ed. 2012).

³¹ Cf. D.50.17.202.

attempted such exercises with regard both to concepts and to categories. For instance, Martin Hogg has recently attempted to expose linguistic uncertainties and confusions in the law of obligations to promote consistency in legal decision-making, predictability of legal outcomes, clarity in conceptualization and the ensuring of legal cohesiveness.³² The late professor Birks attempted to inject Darwinian rigor into legal taxonomy.³³ One imagines that such authors would find little to aid them in works about genre and concept theory emerging from film study departments. In fact, Raymond Durnat's seminal article on film noir "taxonomy" (family tree) is almost the antithesis of the kind of work that Professors Hogg and Birks have produced. "The film noir," wrote Durnat, "is not a genre, as the Western or gangster film is, and takes us into the realms of classification by motif and tone."³⁴ Can one imagine a law monograph classifying cases or legal terms by motif and tone?

IV. Style

Yet, in a way, comparative lawyers have been much more open to such ideas. Zweigert and Kötz in their textbook on comparative law discuss the issue of dividing legal systems into different families and conclude that previous attempts had been unsatisfactory. They then argue:

In our view the critical thing about legal systems is their *style*, for the styles of individual legal systems and groups of legal systems are each quite distinctive. The comparatist must strive to grasp these *legal styles*, and to use distinctive stylistic traits as a basis for putting legal systems into groups.³⁵

This is rather intriguing, and indeed the two authors say that the "concept of style which originated in the literary and fine arts has long been used in other fields."³⁶ So, the two authors ask, what are the factors that contribute to the style of a legal system? They identify five aspects of a legal system: "(1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive institutions, (4) the kind of legal sources it acknowledges and the way it handles them, and (5) its ideology."³⁷ These factors are fairly self-evident and exist as means of distinguishing between legal traditions irrespective of the notion of style. Indeed, the notion of style is so difficult in cinema studies that, probably, any attempt to distinguish between style and content is misguided.³⁸ This said, the second factor, which seems similar to another notion

³² Martin Hogg, *Obligations: Law and Language* (2017).

³³ See, e.g., Peter Birks, *Definition and Division: A Meditation on Institutes 3.13*, in *The Classification of Obligations 1* (Peter Birks ed., 1997).

³⁴ Raymond Durnat, *Paint It Black: The Family Tree of Film Noir* 49 (1970).

³⁵ Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 67 (3d ed. 1998) (emphasis in original).

³⁶ *Id.*

³⁷ *Id.* at 68.

³⁸ Raymond Durnat, *Films and Feelings* 19-30 (1967).

employed by some comparatists, namely, *mentalité*,³⁹ deserves attention since Zweigert and Kötz talk in a way that would not seem out of place in an academic piece on film. Discussing the difference between civil lawyers and common lawyers, they conclude with the comment that on “the Continent lawyers operate with ideas, which often, dangerously enough, take on a life of their own; in England they think in pictures.”⁴⁰

It is not entirely clear quite what the authors mean by the comment about thinking in pictures. Cannot continental “ideas” equally be reduced to images or pictures? The idea of a *mos mathematicus* attitude, which is very much part of the civil law’s historical tradition,⁴¹ immediately conjures up images of geometrical structures such as Kelsen’s triangle or pyramid and Kocourek’s jural relations diagrams.⁴² Some of these continental images are, perhaps, not pictures in the painting or photographic sense—they are more like the diagrams and formulae found on a blackboard (or whiteboard) in a science lecture. However, they resemble a kind of architectural structure, even if a two-dimensional one. Such structures function not just on the lecturer’s blackboard; they can operate within the pictures of factual situations to construct a variety of different images from what might be described as the same situation. It is as if, to use the words of the film writer Raymond Durgnat, there is a “*rapprochement* of the most fluid of all visual media with the most solid and static.”⁴³ Durgnat was commenting here on Carl Dreyer’s view that the cinema’s closest relative is architecture. Yet to suggest a merging of the fluidity of the cinema image with a solid and static image from another discipline ought to stimulate the jurist into reflecting just how much legal reasoning and decision-making is cinematic in the way that fact narration by lawyers arguing a case is a form of “film-making.” Film, said Durgnat, “hurls form into a melting-pot of its own,” and in doing this, it “abducts, reforms, deforms, all it shows.” It “perverts its emotional sense.”⁴⁴

This “perversion” is particularly intense in film production because the director and his or her collaborators are deliberately attempting to manipulate the viewer’s emotional responses. However, the law practitioner will also present the facts of a case in a way that is most favorable to the client’s interest. Indeed, judges may do the same thing in order to help justify a decision that they wish to reach. A particularly notorious example—discussed

³⁹ See Catherine Valcke, *Comparing Law: Comparative Law as Reconstruction of Collective Commitments* 113 (2018). In particular, see Pierre Legrand, *European Legal Systems Are Not Converging*, 45 *Int’l & Comp. L.Q.* 52 (1996).

⁴⁰ Zweigert & Kötz, *supra* note 35, at 69.

⁴¹ Champeil-Desplats, *supra* note 6, at 58-63; James Gordley, *The Jurists: A Critical History* 165-94 (2013).

⁴² On the latter, see Albert Kocourek, *Jural Relations* 7, 16, 21, 78, 81, 85, 89, 90, 97, 102, 103, 105, 106, 107, 149 (1928).

⁴³ Durgnat, *supra* note 38, at 99.

⁴⁴ *Id.* at 100.

in detail elsewhere⁴⁵—is to be found in *Miller v. Jackson*,⁴⁶ where the majority of the Court of Appeal created a factual image in which the female claimant appeared more unreasonable than the defendants, thus allowing the judges to find for the defendant.

One can equally “pervert” a thing rather than a person. In focusing on the land rather than the exploding shell in *Read v. J. Lyons & Co.*,⁴⁷ the judges were able to move the whole affair away from the claimant counsel’s argument that liability should be strict (liability for a dangerous thing) to a situation where liability was wholly dependent upon the proof of fault (private home owner inviting a guest for tea).⁴⁸ One is reminded here of Jerome Frank’s comment “that the very subject-matter of the law activates childish emotional attitudes.”⁴⁹ What Frank meant by this comment was that jurists were “peculiarly reluctant to look into the motives and biases of judges,”⁵⁰ a situation that was surely confirmed by the extraordinary hostility that Frank has attracted in recent years from—indeed—some comparatists.⁵¹ These motives and biases, as Frank pointed out, had an image dimension: a deliberately created theatrical scene becomes, in the minds of those asked to recall what they saw (after different time periods), an unconscious but deliberately recreated scene which often had little relation to the actual scene they were supposedly describing.⁵² One thinks of the central character, Thomas, in Michelangelo Antonioni’s film *Blow-Up* (1966): what did Thomas actually see (via his photographs) in the park? What did he want to see?

Given such hostility to Frank, it might be more useful to look at the function of “architectural” forms in a more general way. What kind of images or pictures come to mind when one discusses, as a comparatist, the law of contract? If Zweigert and Kötz are to be believed, “Continental lawyers think abstractly” while, as we have seen, the common lawyer thinks in pictures.⁵³ This distinction is not wrong as such; there is a difference of mentality resulting from separate histories and varying governing philosophies.⁵⁴ But when one comes to examine the operation of a legal notion such as contract, the position turns out to be more complicated. As a French legal historian has pointed out:

The difference [between common law and civil law contractual thinking] consists in the fact that the civil law systems construct contractual law from the starting point of the classes

⁴⁵ See Samuel, *supra* note 1, at 273.

⁴⁶ [1977] QB 966.

⁴⁷ [1947] AC 156.

⁴⁸ Samuel, *supra* note 1, at 150-51.

⁴⁹ Jerome Frank, *Law and the Modern Mind* 116 (1949).

⁵⁰ *Id.* at 117.

⁵¹ See Birke Häcker, “Substance Over Form”: Has the Pendulum Swung Too Far?, in *Form and Substance in the Law of Obligations* 35, 61 (Andrew Robertson & James Goudkamp eds., 2019).

⁵² Frank, *supra* note 49, at 108-09.

⁵³ Zweigert & Kötz, *supra* note 35, at 69.

⁵⁴ Legrand, *supra* note 39.

of “named” contracts, the “innominate” contract playing only a marginal role. So marginal that when a new innominate engagement starts to acquire a certain practical importance, doctrine and case law are immediately employed to give it a precise legal regime of its own, transferring it into a type of engagement like the named contracts, even if it does not end up as one provided for in legislation.⁵⁵

And he continues:

As a result, civilian jurists practically never work at the general level of contract; in particular, they never concern themselves with wanting to know if a new agreement can or cannot be considered as a contract. Indeed, when faced with a new legal type, they recognize it either as a combination of existing legal types or as the adoption of some foreign accord.⁵⁶

The idea of “named contracts” comes of course from Roman law which did not, as such, have a general theory of contract founded on the sole notion of agreement (*conventio*),⁵⁷ although there was a general form of contracting by words (*stipulatio*). The Romans thought in types of contract such as sale, hire, loan, partnership and so on which, factually, are a series of transactional images. As an historian of Roman law has noted:

The obligation, the contract, ownership, possession, tutorship, usufruct, servitude, pledge, stipulation, loan, deposit, inheritance, legacy, sale, hire, corporation, but also equity, fraud, good faith, mistake and the like—this small group of forms that has become familiar to us through long usage—were to become the actors in an invisible scenario, quasi spectral, but capable of influencing in a decisive way material reality, life, and which would finish by appearing completely devoid of sense (legal) outside their presence.⁵⁸

This is to say that these forms of law—these “images” of particular kinds of transactions—having been induced out of descriptive factual situations, re-descend so to speak into the facts. Yesterday’s formal images become today’s realities. And indeed the Roman jurists themselves rarely tried to give formal definitions to these legal notions or institutions, preferring instead to give them a pictorial reality through specific problem examples. The “Roman jurists,” says James Gordley, “moved from a concept to its application in a particular case all at once, without explaining how they got from one to the other.”⁵⁹ No explanation was necessary because the required information was in the “picture”—in the factual image—creating the context in which the concept finds its application. One hesitates to call these images “poetic” in the same way as Raymond Durnat talked about the “poetic language of a film”; but, as he pointed out, if “modern rationalism can no longer follow the poetic language of a film . . . so much the worse for modern rationalism; one doubts whether it’s even rational, except in trivial mannerisms.”⁶⁰ Rationality is of course a difficult notion in law and legal facts are hardly poetry, although a well-written judgment attempting to

⁵⁵ René-Marie Rampelberg, *Repères romains pour le droit européen des contrats* 35 (2005).

⁵⁶ *Id.*

⁵⁷ A bare pact (*pactum nudum*) gave rise to no obligation: D.2.14.7.4.

⁵⁸ Aldo Schiavone, *Ius: L’invenzione del diritto in Occidente* 196 (2d ed., 2017) (author’s translation).

⁵⁹ Gordley, *supra* note 41, at 8.

⁶⁰ Durnat, *supra* note 38, at 250.

describe them does no harm. But cinema studies can remind jurists and comparative lawyers that the “pictures” identified by Zweigert and Kötz carry with them a form of non-symbolic knowledge. That is to say, knowledge that cannot be captured by the symbols either of numbers and mathematical formulae or of language.

V. Constructing Facts

It is this non-symbolic knowledge transmission that often lies at the heart of cinema and it is in the understanding of how this can function where one finds lessons for jurists and comparatists. There is much more to style than just contrasting the civil law’s apparent love of abstraction and logic with the common law’s more earthly thinking in pictures. Style is far more subtle in the way it depicts the world through the forms of law such as ownership, possession, sale, hire, partnership and so on; these are in themselves formalized stylistic devices that have come to shape the way lawyers—indeed many non-lawyers as well—“see” facts. As René Provost has noted, “[T]he operation of the law implies the production of a certain vision of reality.”⁶¹ Perhaps, then, comparative lawyers are focusing on the wrong element in comparing law; perhaps, instead, they should start by comparing facts. The comparatist might think of herself as a film director working for Roger Corman, with a small budget and a few days to make a B-feature.⁶² How many actors will there be? What props might be used? How will the actors relate both between themselves and between themselves and the props? Where might the filming take place: in a city, in a park, in a desert or where? These questions feed into a more general one. To what extent will these issues determine the “facts” of the film story? Or, put another way, how does the “poetic language of the film” impact upon the narrative itself?

Compare, for example two film possibilities based on a single plot outline. A photographer (in the days before digital cameras), with some time on his hands, takes a series of random photos and thinks nothing of them until an insistent stranger demands that the photographer hand over the negatives because of invasion of privacy. Intrigued by this insistence, the photographer, on arriving back at his studio, immediately sets about developing the negatives and producing prints. On a closer examination of one or two of the prints, he notices something curious and immediately enlarges and enlarges one of the prints. The image is fuzzy by this enlargement stage, but out of the fuzz there is seemingly an image suggesting that he has by chance photographed someone in the act of committing a murder. This is the bare plotline, but where might the film director set these events? The director could choose the enclosed space of an apartment overlooking a courtyard where the interiors of many other apartments can be viewed, in the manner of Alfred Hitchcock’s *Rear Window* (1954). The claustrophobic setting surely would endow the narrative with a sense of menace, for the stranger has noticed the photographer using his camera and has appeared at the door of his flat demanding the negatives. The dark lighting of the building’s,

⁶¹ René Provost, *Cannibal Laws*, in *Culture in the Domains of Law* 293, 335 (René Provost ed., 2017).

⁶² See New World Pictures (https://en.wikipedia.org/wiki/New_World_Pictures).

and the apartment's, interior would of course heighten the tension. Another possibility is to place the whole event in a leafy park where the dominant visual image is one of open space, as in Michelangelo Antonioni's *Blow-Up* (1966). In this context the stranger, however insistent, will appear far less menacing; a much smaller figure one might say in a very large landscape (although that can also be turned into a menacing image as Hitchcock demonstrated in *North by Northwest* (1959)). The green and natural environment together with the rustle of the wind in the trees would create an atmosphere that is very different to the one in an apartment block. The social matrix of the two films would also be different. In *Blow-Up* the open space of the park isolates the protagonist from the rest of society—and even a group of silent student mime actors indulging in rag-week antics seem remote by their silent acts. But in *Rear Window* the central character is faced with a range of different and often rather sad social situations played out in each apartment that the protagonist overlooks; it is a kind of “hen-battery for human beings, a teasing limbo which is the human condition.”⁶³ (With regard to this spying on social situations, one might also view John Boorman's *Leo the Last* (1970).)⁶⁴

If one switches to “legal” facts, comparative law students might be asked, after seeing the two (or three) films just mentioned, to construct a set of facts within the context of a “legal” tradition that does not in any way share the assumptions of a Western legal system. Maybe, for example, there is not the strict division between person (*persona*) and thing (*res*) or perhaps there is not the same distinction between the living and the dead. Or, again, perhaps people do not see their social interactions through the notions of “sale,” “hire,” “ownership” and the like. Out of such fact construction, the comparative legal studies student might, hopefully, gain insight into the relationship between the elements within social facts that act as building blocks for a legal “reality.”

Yet does such an exercise matter? It certainly matters with respect to the question of culture-in-law—that is to say, the problem of how a national legal system handles multiple cultural narratives within its jurisdiction. As René Provost has noted, the way in which Western law handles culture within its jurisdiction is to reduce it to fact so that it becomes amenable to the application of legal rules. This process itself is manipulative in the following way:

The process whereby a culture becomes reduced to facts is one in which a particular cultural narrative is created. The massaging of culture into facts involves a translation of beliefs and practices into the description of a static context, in a language suitable to be understood and relied upon by legal actors. It involves a version of the culture which has been transformed by the parties, packaging their culture in terms comprehensible by the courts.⁶⁵

It is here that the lawyer resembles a film-maker, if a less entertaining one. For the “cinema’s mimetic fullness (photography, movement, sound) permits the creation of a *self-sufficient*

⁶³ Raymond Durnat, *The Strange Case of Alfred Hitchcock* 236 (1974).

⁶⁴ *Id.* at 244.

⁶⁵ René Provost, *Centaur Jurisprudence: Culture Before the Law*, in *Culture in the Domains of Law*, *supra* note 61, at 1, 6.

world” and thus “the film director weaves diverse media into a ‘new’ reality.”⁶⁶ Lawyers representing the culture indulge in a similar process when they “factualize” it; they transform it and so package “their culture in terms comprehensible by the courts.”⁶⁷ These manipulations in cinema and in law perhaps come together in the film version of Kafka’s vision of the legal process itself. In Orson Welles’s *The Trial* (1962)—one might note the mistranslation of *Le Procès* (*El Proceso*, *Der Prozess*)—the buildings were essential to the narrative and to the creation of an image of legal bureaucracy. “The vast complex of rooms in Orson Welles’s *The Trial*,” noted Durnat, “is not the studio construction it may seem, but the derelict Gare d’Orsay in Paris ‘merged’ with a Yugoslavian exhibition hall.”⁶⁸ These buildings permitted Welles to create his “paranoid baroque” and to make “all space fidget.”⁶⁹ The efficiency of the law system versus the dilapidated architecture creates a “hollow grandeur” which has the effect of intimidating any cultural diversity into a kind of Freudian conformity.⁷⁰ Law consumes. Or, as René Provost put it in his chapter on cannibal laws, the “cannibal metaphor thus not only suggests that law consumes other ways of thinking about reality to aliment its own operation, but further reflects a more general association of cannibalism with power and dominance.”⁷¹ A dilapidated Gare d’Orsay certainly gives expression to such metaphorical cannibalism.

VI. Viewing the Other

The process by which law “views” a sub-culture within its jurisdiction is part of a more general issue about the way a jurist from one legal culture views another legal (or “legal”) culture. For example, the comparatist formed within common law or the civil law tradition who turns her attention to, say, Chinese law or Islamic law will need to be aware of a range of pitfalls that awaits them. These pitfalls can be located at a variety of levels. At the level of language there is a problem with expressions such as “law,” “ownership,” “contract” and the like in that these terms may have no equivalent in the culture of the other tradition. At the level of structure a similar issue presents itself; Western legal distinctions such as the ones between “public” and “private” or between “property” and “obligations” again may have little relevance. And so for example to impose Kelsen’s pyramid of “norms” on the other might well be inappropriate.⁷² At an even more general level—and linked to the previous two levels—there is the problem of what might be called legal colonialism or legal imperialism. This is where the comparatist imposes on the other her own legal mentality.

⁶⁶ Durnat, *supra* note 38, at 99 (emphasis in original).

⁶⁷ Provost, *supra* note 65, at 6.

⁶⁸ Durnat, *supra* note 38, at 102-03.

⁶⁹ *Id.* at 112.

⁷⁰ *Id.*

⁷¹ Provost, *supra* note 61, at 336.

⁷² On the idea of a pyramid as system, see, e.g., Gérard Timsit, *Système*, in *Dictionnaire de la culture juridique* 1462 (Denis Alland & Stéphane Rials eds., 2003).

Such an imposition may be unconscious and might actually start with the whole notion of “law” itself since the moment one talks in terms of comparative “law” it is being assumed that the idea of law is to be found in the culture of the other. These problems (along with others) have resulted in a body of literature that can be described as “postcolonial” and (or) “critical” comparative legal studies.

Another expression used to describe this more recent literature is “post-modern.” This expression has been applied by Mathias Siems to a comparative law that “aims to challenge both the traditional and the modern” approaches and methods;⁷³ and it is an approach that emphasizes culture, language, ideology and the like, and “how biases and preconceptions influence our understanding of foreign legal systems.”⁷⁴ Such post-modernism is associated with comparatists such as Pierre Legrand, Richard Hyland and David Kennedy. In film studies the label is employed rather differently, and perhaps not always in a positive sense in that there is an emphasis on “acute stylization” and a “self-conscious concern” with story-telling and references often to other films.⁷⁵ This seems like a very different form of post-modernism. One reason for this difference is the historical element that attaches to the academic writing in each discipline. In law there is a tradition covering two-millennia (at least),⁷⁶ while in film studies there is an academic heritage that only goes back to the mid-twentieth century.⁷⁷ Post-modernism in comparative law is thus a useful term, even if one that is not entirely appropriate, to mark a new direction with regard to the academic scholarship. Post-modernism in cinema is different because there is not a long enough period in which one can locate a distinct change of direction; indeed some of the more radical—“post-modern”—writing has come from Raymond Durgnat, whose dissension from the then literary consensus took place at the start of scholarly writing on film.⁷⁸

In fact, the expression “post-modern” attaches to the films themselves rather than to the scholarship. Film-makers from the 1970s onwards have often indulged in repeated references to previous films; and while this can often be positive, it can also lead to accusations of pastiche and nostalgia. Catherine Constable, drawing on the cinema literature

⁷³ Siems, *supra* note 20, at 116.

⁷⁴ *Id.* at 144.

⁷⁵ Catherine Constable, Postmodern Cinema, in *The Routledge Encyclopedia of Film Theory*, *supra* note 22, at 376, 376.

⁷⁶ A useful overview is Peter Stein, *Roman Law in European History* (1999).

⁷⁷ One early work is Roger Manvell, *Film* (1944). Cinema studies became established in universities only in the 1970s. Writing in the mid 1960s, Ralph Stephenson and Jean Debrix wrote in the Foreword of their book advocating a more academic approach to film appreciation: “[W]here are its articles, its books, its exponents?”; Ralph Stephenson & Jean Debrix, *The Cinema as Art* 7 (1965). Raymond Durgnat had of course been writing since the late 1950s and the Slade Arts School appointed a lecturer in film in 1960. See generally *The Essential Raymond Durgnat* 1-6 (Henry Miller ed., 2014).

⁷⁸ See generally *The Essential Raymond Durgnat*, *supra* note 77.

devoted to post-modernism in the cinema, describes post-modern films as a form of pastiche in which stylistic innovation is no longer possible.⁷⁹ Richard Dyer is much more nuanced on this question of pastiche, making the important point that this term is “used a lot and loosely.” At one end of the scale it is a pejorative term, meaning the empty harking back to obsolete models, second-rate imitation or just parody; at the other end it can be applied to an idealization of style, a form of influence or a useful rhetorical craft.⁸⁰ It does not, then, always have a pejorative implication and this is why Dyer spends much time on a genre like the Western, which he describes as being self-aware from quite an early period.⁸¹ He equally spends time discussing neo-noir films.⁸² He makes many perceptive points, but on neo-noir he concludes that it can “trail a sense of where the style came from, what it came out of, and thus allow the possibility of inhabiting its feelings with a simultaneous awareness of their historical constructedness.” In other words, pastiche “makes it possible to feel the historicity of our feelings.”⁸³ Constable’s view of post-modernism and pastiche is, perhaps, too restricted.

What of post-modernism and law? Whatever one might think of the “post-modern” comparatists, one can hardly accuse them of indulging in the sins of second-rate imitation. Mathias Siems, while not uncritical, concludes that the “postmodern approaches to comparative law illustrate that there is considerable diversity in the way comparative law can be researched” and they “also stimulate methodological awareness, in particular as they highlight the limitations of traditional comparative law.”⁸⁴ Nevertheless, within the common law tradition there does appear to be emerging a group of private law scholars who have attracted the label “neo-formalists” and whose work could impact on comparative law if only in certain indirect ways. This school has been discussed in more depth elsewhere,⁸⁵ and so for present purposes it might be useful to mention how this new school could be described as post-modern only with difficulty. As Steve Hedley has indicated, the work of the neo-formalists “merely repeats the views of leading law teachers circa 1880,”⁸⁶ and thus one has to ask whether one is really seeing a new kind of formalism or just the “empty harking back to obsolete models” or “second-rate imitation.” If the latter, then the work of these neo-

⁷⁹ Constable, *supra* note 75.

⁸⁰ Richard Dyer, *Pastiche* 7-8 (2007).

⁸¹ *Id.* at 93-118. One might note that the director Sergio Leone openly cited the American Westerns that he referenced in his own Italian Westerns; see Christopher Frayling, *Sergio Leone: Once Upon a Time in Italy* 59-63 (2005).

⁸² Dyer, *supra* note 80, at 119-30.

⁸³ *Id.* at 130.

⁸⁴ Siems, *supra* note 20, at 144.

⁸⁵ Geoffrey Samuel, *Is Legal Neo-Formalism Nothing but Pastiche?*, 15 *J. Comp. L.* 347 (2020).

⁸⁶ Steve Hedley, *Looking Outward or Looking Inward?* in *Obligations Scholarship in the Early 21st Century: The Goals of Private Law* 193, 199 (Andrew Robertson & Tang Hang Wu eds., 2009).

formalists might well be described, not as post-modern but as pastiche and nostalgia.⁸⁷ Of course, in film studies one is talking of film-makers, while in law one is talking of academic writers. One is not comparing like with like. However, while there is on the whole a clear separation between film practitioners and academic writing about film, the separation between practitioner and academic is less clear-cut. The neo-formalists are aiming directly to influence the judiciary,⁸⁸ while the film academics are probably aiming their writing for the most part not at film practitioners but at others in the academy. The irony is that if post-modernism can be identified with pastiche, as Catherine Constable suggests, the “post-modernists” in law are the highly conservative neo-formalists urging us back to a pre-post-modernist era.

Just how this neo-formalist turn in law will influence comparative legal studies is difficult to judge, save that it might well give some encouragement to those comparatists who are unhappy with the interdisciplinary turn associated with the so-called “post-modern” comparative law jurists.⁸⁹ In fact the problem is more deep-rooted, methodologically, than simply one connected to neo-formalism. As one professor of comparative law has written, “[A]s lawyers, we must begin by erring on the formalistic side,” which means we “have to ‘split hairs.’”⁹⁰ Law, she indicates, is formalistic in its nature and thus movements such as American Realism amounted to a “jurisprudence of despair.”⁹¹ She claims that the right balance between form and substance in law, at least with regard to English law, was achieved back in the twentieth century when there was “a relatively stable position mid-way between ‘formalism’ and loose ‘subjectivism.’”⁹² As for comparative law, she claims that “[t]raditional ‘comparative law methodology’ has its own version of the ‘substance over form’ maxim, namely the call to prioritise ‘function over form.’”⁹³ She then quotes at length from Zweigert and Kötz who, of course, famously advocated functionality,⁹⁴ before concluding that it is “not a suitable methodology to adopt” when looking at what she regards as a new comparative form of dialogue between common lawyers in different countries.⁹⁵ Quite what methodology such common lawyers should adopt if they are prohibited from using the functional approach is not clearly indicated. Is it a matter of structuralism, dialectics (“hair-splitting”) or what? It is tempting to conclude that whatever the shortcomings

⁸⁷ See Samuel, *supra* note 85.

⁸⁸ See, e.g., James Lee, Trends in Tort Law, in *Form and Substance in the Law of Obligations* 275 (Andrew Robertson & James Goudkamp eds., 2019).

⁸⁹ See, e.g., Bénédicte Fauvarque-Cosson, Development of Comparative Law in France, in *The Oxford Handbook of Comparative Law* 29, 49-50 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed., 2019).

⁹⁰ Häcker, *supra* note 51, at 66.

⁹¹ *Id.* at 61.

⁹² *Id.* at 62.

⁹³ *Id.* at 67.

⁹⁴ See Zweigert & Kötz, *supra* note 35, at 34.

⁹⁵ Häcker, *supra* note 51, at 68.

of academic writing about film, it has not yet descended into this kind of anti-intellectualism. However, in fairness, part of the problem is an epistemological one with regard to the discipline of law: it is subject to an authority paradigm whereby doctrinal writers are restricted in the kinds of critical perspectives that can be brought to bear on the texts and on the judges.⁹⁶ Any kind of sociological analysis of the type undertaken by Jerome Frank is simply dismissed as the “jurisprudence of despair.” This said, it is difficult to escape from the conclusion that neo-formalism has nothing to offer to the serious comparatist, when viewing the “other,” except rather superficial structural comparisons. An equivalent approach in comparative cinema would be one that is limited to comparing narrative structures abstracted from any cultural, or even genre, setting.

VII. Orientalism

One of the most important aspects of the “post-modernist” comparative law is, then, the emphasis on culture. Law is entirely a cultural phenomenon and the role of the comparatist is to understand the culture and *mentalité* of the “other” through a hermeneutical scheme applied to the foreign legal text. Indeed, it is argued that the hermeneutical approach goes beyond the methodological; it is philosophical in its orientation.⁹⁷ In film studies, the cultural paradigm has also generated a range of different theories and approaches, reception theory being of particular relevance to law.⁹⁸ Another important discussion that is relevant to law, and the viewing of the “other,” is Orientalism. This has its origin in a work by Edward Said who employed the expression Orientalism to mean “a way of coming to terms with the Orient that is based on the Orient’s special place in European Western experience.”⁹⁹ Said went on to say that it is “a style of thought based upon an ontological and epistemological distinction made between ‘the Orient’ and (most of the time) ‘the Occident.’”¹⁰⁰ The author explained that this distinction was one of power and so the notion of the “Orient” did not come from the voices of the people who made up this so-called “Orientalist” tradition but from the voices of Westerners.¹⁰¹ It is “a collective notion identifying ‘us’ Europeans as against all ‘those’ non-Europeans” which emphasizes “the idea of European identity as a superior one in comparison with all the non-European peoples and cultures.”¹⁰²

Perhaps the classic example of this type of thinking amongst common-law lawyers and jurists is the expression “palm-tree justice.” This has been defined as a Cadi sitting

⁹⁶ On which see Geoffrey Samuel, *Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?*, 36 J.L. & Soc’y 431 (2009).

⁹⁷ See generally Pierre Legrand, *Le droit comparé* (5th ed., 2015).

⁹⁸ Samuel, *supra* note 1, at 218-22.

⁹⁹ Edward Said, *Orientalism* 1 (1985).

¹⁰⁰ *Id.* at 2.

¹⁰¹ *Id.* at 5-6.

¹⁰² *Id.* at 7.

under a tree and dispensing justice without reference to law texts or precedents;¹⁰³ and while this expression is clearly a blatant example of Orientalism (since “palm-tree justice” is a pejorative expression), it is still regularly employed by academic writers and judges. Palm-tree justice is used as a contrasting image to the “scientific” rationality and coherence of Western legal systems. In the civil law tradition, a good example of this kind of Orientalism is to be found in the way the legal community—especially the Roman law specialists—over the centuries has filtered out “everything which was Egyptian, or Assyrian, or Persian” in order to preserve the “Greek ideal” and “to avoid ‘dethroning’ Roman Law.”¹⁰⁴ As Professor Monateri concludes:

From this viewpoint, the “renewal” of Roman law through the ages does not demonstrate a peculiar capacity in Roman law itself, but rather the peculiar capacity of later lawyers, especially in the civil law tradition, to adopt newer rules and solutions and to attach them to the authority of the old Roman texts. Coptic, Ethiopian, or Chinese texts would have worked as well. The “recall to Rome” does not reflect the quality of Roman products, but the strategy of legitimization that dominated in Europe.¹⁰⁵

Orientalism has also been the subject of a major investigation by Sir Christopher Frayingling with respect to popular culture, including of course the cinema (on which Frayling is a specialist).¹⁰⁶ This project, supported by Edward Said himself,¹⁰⁷ looked in particular at the way Chinese people had been portrayed in popular novels and in films. As Frayling noted:

The US Postal Service, in 1995, issued a stamp prominently featuring Ming the Merciless, as part of a “comic-strip classics” series; in 2008, Royal Mail in Britain issued a stamp of the dust-jacket of Ian Fleming’s *Dr. No* to commemorate Fleming’s centenary. Such official visual imagery reveals—among many other things—that there is much less sensitivity about depictions of Chinese villains than there is about those from other ethnic groups. Dr Fu Manchu, progenitor of Ming and Dr. No, lingers in popular consciousness more than any other twentieth-century villain—whether or not the generation of 2000 can actually put a name to him.¹⁰⁸

Ming the Merciless, Dr. No and Fu Manchu have all made their way from books to the cinema to join a host of other films in which Chinese people have been portrayed not just in “Orientalist” ways, but often in blatant racist tones. An example of the latter is *The Mask of Fu Manchu* (1932), featuring Boris Karloff as the “evil villain.” As Frayling says, this film “has come to epitomize the worst aspects of American Sinophobia: the character of Fu, the

¹⁰³ See, e.g., David M. Walker, *The Oxford Companion to Law* 915 (1980). There are numerous references to the expression in U.K. law journals and judgments.

¹⁰⁴ Pier Giuseppe Monateri, *Early Roman Law and the West*, in *The Oxford Handbook of European Legal History* 162, 177 (Heikki Pihlajamäki et al. eds., 2018).

¹⁰⁵ *Id.* at 184.

¹⁰⁶ Christopher Frayling, *The Yellow Peril: Dr Fu Manchu & The Rise of Chinaphobia* (2014).

¹⁰⁷ *Id.* at 9-10.

¹⁰⁸ *Id.* at 13.

iconography of silk robe and mandarin fingernails, the tortures, the mindless mass of ‘orientals,’ the sexual joke, the deep horror of miscegenation.”¹⁰⁹ There were subsequent Fu Manchu films made by Tower Films in the United Kingdom in the 1960s with Christopher Lee as the Fu Manchu. These films were possibly not quite as blatantly racist—although Tsai Chin who played Fu Manchu’s sadistic daughter thought that they were “very racist”¹¹⁰—but they certainly remain, along with *The Strangers of Bombay* (1959) and *Terror of the Tongs* (1960) (also starring Christopher Lee in a Fu Manchu-type role), some of the clearest examples of Orientalist British cinema.

Returning to law, this problem of Orientalism has been identified as one affecting comparative law. Thus Teemu Ruskola posed this question: “Why, despite vigorous efforts to debunk it, does the view of China’s lawlessness continue to prevail—not only in the popular opinion and among policy-makers, but even among legal scholars who do not specialize in China as well as China scholars who do not specialize in law?”¹¹¹ After Ruskola’s exhaustive analysis of the way that Chinese law and culture has been regarded in the United States, one can only arrive at the conclusion that writings by some lawyers, jurists and others have given as negative impression as any of the Orientalist films mentioned by Christopher Frayling. Indeed, Ruskola quotes some views of Western jurists about Chinese legal thought that are simply gratuitously offensive. Nevertheless, Ruskola is perhaps more sympathetic than Frayling in his reaction to this Orientalism:

The moral of this Article is not to issue a categorical imperative that comparative lawyers must cease Orientalizing China, that it must never constitute a mere means in our own projects of legal self-definition. While such moralizing is perhaps rhetorically satisfying, a categorically anti-Orientalist morality is simply not possible. Prejudices, in the neutral Gadamerian sense, can only be managed, not eliminated.¹¹²

Indeed, he continues:

[T]here is no innocent knowledge to be had, and we have little choice but to Orientalize—to always anticipate China and its legal traditions in terms of our own biases. Moreover, not only are we inevitably always engaged in Othering and essentializing China and Chinese law as we seek to understand them, but the Chinese, likewise, essentialize us, the West. Moreover, both we and the Chinese essentialize our own traditions as well: the Chinese “self-Orientalize” and Americans “self-Americanize,” as it were.¹¹³

Of course, escaping legal imperialism is not easy. One problem with “law” is the word “law” itself which comes with a whole Western epistemological and historical baggage. Thus, one starting point might be to abandon “law” as an epistemological starting point and to approach the Other with a more functionalist notion such as “dispute resolution.” How are

¹⁰⁹ Id. at 310.

¹¹⁰ Id. at 322.

¹¹¹ Teemu Ruskola, Legal Orientalism, 101 Mich. L. Rev. 179, 184 (2002).

¹¹² Id. at 222.

¹¹³ Id.

social conflicts and tensions handled institutionally (using this latter expression in as “neutral” a way as possible)? As for law as a set of legal relations—rights, duties, contract, ownership and the like—these terms must be left aside and thus it might be better to start with persons and things as sociological focal points. How are relations envisaged between these social “realities?” One should abandon, in other words, Western structural methods. Ruskola suggests, as we have just seen, that this is probably impossible; we cannot escape our own biases. But, as Pierre Legrand says, all comparison is defective. For the idea of a “discourse of comparison ‘pure’ and independent, disconnected from any system of values, [and] socially neutral” is impossible.¹¹⁴ In *Out of the Past* (1947), Kathie (Jane Greer), in a casino with Jeff (Robert Mitcham), asks Jeff whether there is a way to win at the tables. “There’s a way to lose more slowly,” he replies. Echoing this sentiment, Legrand suggests all attempts at comparison are doomed, and that the best to be hoped for is that one might “fail better.”¹¹⁵ Or perhaps one could say, “fail more slowly.”

VIII. Referencing and Comparison

It has already been noted how the contributions of writers like Ruskola and Legrand have attracted the term “post-modern” and how, when applied to cinema, this expression has identified the referencing of past films as one of its characteristics. This “post-modern” referencing of past films is not, of course, comparison and so one should note an important distinction with regard to academic writing on film. Writers often undertake an analysis of a single film in the course of which they may reference other films, sometimes in passing and sometimes in more detail. However, they may also spend time actually comparing the film under analysis with another film. To take just one example: William Luhr’s book *Film Noir* consists mainly of chapters analyzing in depth a selection of the leading film noir movies made during the last century.¹¹⁶ There is plenty of referencing in these chapters to films other than the one being analyzed, but also on occasion there is some detailed comparison between the films discussed, especially in the chapter devoted to *The Long Goodbye* (1973, directed by Robert Altman and based on Raymond Chandler’s Philip Marlowe detective novel). Comparison becomes an important element in understanding this film not only because it largely broke the traditions associated with classical film noir. It also was scripted by Leigh Brackett, who had been one of the scriptwriters for *The Big Sleep* (1946), which is regarded by many as falling within the classic 1940s film noir tradition and of course was also based on Chandler’s detective.

Consequently, an analysis of the 1973 film can really only be done through a comparison not just with other films, either contemporary ones or movies from an earlier age, but with the strategies adopted by the film maker. Thus, says Luhr:

¹¹⁴ Legrand, *supra* note 97, at 115.

¹¹⁵ *Id.* at 121.

¹¹⁶ William Luhr, *Film Noir* (2012).

The movie's pacing differs from classical Hollywood pacing. It begins very slowly, not by presenting the viewer with a puzzling crime or a mysterious, menacing situation but, rather, with what seems to be an aimless scene involving Marlowe and his cat. Many other scenes also initially seem meandering. As opposed to classical Hollywood style, where cinematography, editing, and blocking generally conspire to provide a clear focal point to each shot, Vilmos Zsigmond's Panavision camera in *The Long Goodbye* seems constantly to be roving through the sets and among the characters in what at times seems an arbitrary manner.¹¹⁷

Luhr goes on to make the point that the cinematographer developed a unique visual style for the movie, this style being understandable only by comparison with other film styles. And so, continues Luhr:

This differs substantially from the visual strategies used by cinematographer John Alonzo two years later for *Farewell, My Love*. In that film and for one of the first times in a Hollywood movie, Alonzo used Fujicolor film stock, which he considered uniquely equipped for emphasizing warm colors and endowing the images with a comfortable, nostalgic "feel." By contrast, many images in *The Long Goodbye* have a cold, plastic "feel," suggesting neither warmth, depth, nor anything below the movie's hard surfaces.¹¹⁸

Now this may be a good or not so good comparative exercise, but, and this is the point being emphasized, it is a comparative exercise. One might compare, then, this exercise with a later comment by William Luhr:

The Long Goodbye illustrates one of the strategies available to neo-*noir*. It takes an old tradition that was being revived in nostalgic ways at the time and references it in an anti-nostalgic film that critiques that tradition as well as the very value of reviving it. It does so, as *Little Big Man* (1970) did with the Western, by questioning the generic premises of that tradition, both at the time of its revival and even for the earlier era when the genre was contemporary.¹¹⁹

The 1973 film is not being compared to *Little Big Man*, save in the most superficial way. Mention of the 1970 film is by reference and not by comparison. The distinction is important because comparison ought to be just what it says: an exercise in comparing and not just an exercise in referencing. This is not to suggest that referencing is to be criticized; indeed it is extremely valuable, as William Luhr's chapter on *The Long Goodbye* consistently confirms. But its epistemological role is different. Referencing is often a means of moving from the specific to the generic; it is a means of saying this film belongs in a category that contains these other films. Or this film is like that film or this film is not like that film (but with no further comparative analysis). Comparison, in contrast, ought to be undertaken to produce knowledge that cannot be elicited without the comparison.¹²⁰

What is the relevance of this suggested distinction to legal studies? The lawyer or jurist may well ask themselves, not unreasonably at first sight, why one would need to venture into film studies to perceive a distinction that is easily identifiable in almost any common law Supreme Court decision (or often in any judgment). There are many examples

¹¹⁷ Id. at 162.

¹¹⁸ Id. at 162-63.

¹¹⁹ Id. at 167.

¹²⁰ Yves Chevrel, *La littérature comparée* 3 (5th ed. 2006).

of judges comparing, sometimes in some detail, one previous case with another; equally there are plenty of judgments in which there are just references to other cases. Indeed the dialectical method is one of the oldest schemes of intelligibility to be found in legal reasoning.¹²¹ However, it does have to be asked if, in the comparing that takes place when a precedent—or an apparent precedent—is being compared with the circumstances of the case in hand, this is really an exercise of comparison. Is it not more an exercise in distinction, often for the purpose not of eliciting new knowledge as such—although much depends here on what exactly is meant by legal knowledge—but of justifying a legal decision?¹²² Of course such an exercise might well mean that a textbook writer will have to adapt her text to accommodate this new decision and this might even be a matter of stating a new rule or principle. Yet this is arguably just an adjustment to knowledge rather than some genuinely new insight about law itself. This is not to suggest that William Luhr is necessarily offering some grand new insight in cinema studies, but he is adding a contribution, however modest, to our understanding of neo-noir and its relationship to classic film noir. As we have seen, this is a complex issue and a comparison of Altman's controversial film—and as Luhr indicates, it was controversial in its time—with the styles of classic film noir indicates that an understanding of *The Long Goodbye* contributes to this knowledge. His comparison of stylistic and narrative construction is essential to this understanding.

But be that as it may, more important for present purposes is the relevance of the distinction between comparison and reference for comparative legal studies. Here, the relevance is of major importance since there are texts where foreign laws are just referenced and there are texts where an actual comparison is undertaken; yet both exercises are often treated as “comparative law.” One only needs to look at the contributions to a major edited work on comparative law and the courts.¹²³ In this work there are, certainly, cases analyzed and/or cited where some actual comparison is undertaken by the judges, but many of the so-called comparisons are not really comparisons as such. They are often just descriptions of the foreign law, with the courts or individual judges making some rather general observations (although not necessarily unimportant ones). The editors themselves seem to suggest that merely referring to foreign law qualifies as a form of “comparative law”:

One may talk about an international market place for judgments, where the form of judgments may be influenced by the accessibility and increased use of comparative law. In jurisdictions where the form of judgments allows it, judges make open reference to comparative law sources, and in particular to judgments by foreign courts. We have pointed to the variation between national systems (and sometimes even within them). Where the form of judgments is not open for the citation of foreign law sources, there may be an advocate-general or *rapporteur* who makes direct references, or the use of comparative law sources may be acknowledged in less formal ways.¹²⁴

¹²¹ See generally Samuel, *supra* note 1, at 12-56.

¹²² A good recent example might be *WM Morrison Supermarkets v. Various Claimants*, [2020] 12 UKSC 12.

¹²³ *Courts and Comparative Law* (Mads Andenas & Duncan Fairgrieve eds., 2015).

¹²⁴ *Id.* at 10-11 (footnotes omitted).

This reference or citation exercise by judges is not really comparative law. This is not to criticize the book itself or the citation of foreign material; the book is a valuable contribution in the way that it charts how national judges and jurists are open to foreign ideas. Thus, in this context, and given the project, a wide definition of “comparative law” might well be justifiable.¹²⁵ But it is important to emphasize that a distinction does need to be made between “comparative law” as a very generalized expression that includes any referencing to foreign law and “comparative law” as an academic pursuit with a much more precise methodological and epistemological foundation. In this latter situation, the notion of comparison is one central focal point. How does comparing, of itself, produce knowledge that could not otherwise be elicited from the material being studied?

IX. Conclusion

There are no doubt a number of other themes in film studies that could warrant investigation. Some of these other themes have actually been discussed elsewhere—in particular representation theory and reception theory—but there are others that could perhaps be pursued with profit. One thinks of the interface between the universal and the particular, a topic that has attracted film theorists, because this theme is relevant for jurists as well.¹²⁶ However on the basis of the themes discussed in this present contribution, one can return to the question posed at the outset. Has film studies anything to offer the comparative lawyer? The skeptic, it has to be said, may well remain unconvinced. Teemu Ruskola’s conclusions on legal Orientalism were arrived at without the need for any recourse to cinema studies and Zweigert and Kötz’s thesis on the importance of a legal tradition’s style equally made no reference to film scholarship. The distinction between reference and comparison could also be elicited just from a close examination of judgments. As for post-modernism, the skeptic might well argue that the expression has little epistemological force and often means different things in different contexts.

Yet a less skeptical view is possible. Zweigert and Kötz’s importation of style from literature and the arts into the realm of comparative law is, arguably, very superficial. There is surely more to be said about this thesis than just announcing, for example, that common lawyers think in pictures. What are these pictures? How do they differ from a picture in the mind of a *Cour de cassation* judge reflecting on a factual situation riven with emotional content and/or complexity? Even if the “facts” are presented in a much more abstract way in a French Supreme Court than is the case in a common law one, the judge still has “to imagine what is not directly perceptible.”¹²⁷ What if the judge is like a film director? As Raymond

¹²⁵ In fact, the present author’s own contribution to this volume deliberately (rightly or wrongly) takes a wide view of “comparative law” and makes no attempt to distinguish between comparison and reference; indeed it takes as wide a view as possible in order to indicate the influence of (in particular) civil law thinking on common law judges. Geoffrey Samuel, *Comparative Law and the Courts: What Counts as Comparative Law?*, in *Courts and Comparative Law*, supra note 123, at 54.

¹²⁶ Warren Buckland, *Interface*, in *The Routledge Encyclopedia of Film Theory*, supra note 22, at 268.

¹²⁷ Théodore Ivainier, *L’interprétation des faits en droit: Essai de mise en perspective cybernétique des “lumières du magistrat”* 112 (1988).

Durgnat said, “[T]here is a wealth and subtlety possible when directors, instead of merely ‘illustrating’ a script, think in graphic terms.”¹²⁸ Content, concluded Durgnat, “is created out of the details of style.”¹²⁹ The comparatist might develop the style thesis by asking if some judges are “illustrators” while others are “graphic thinkers.” In other words, one can learn much from an understanding of the composition and construction of images in films. Does legal education in different traditions encourage a certain way of thinking about facts? Moreover, a film such as Antonioni’s *Blow-Up* (together with the critical commentary on it) can be employed to show how lawyers and judges can often see what they want to see. Thomas in *Blow-Up* increasingly saw what he probably wanted to see in the fuzzy photographic images and, perhaps unconsciously, he wanted, and thus began to hear, the sound of the tennis ball in a mimed tennis game. Lawyers of course want to “see” possession, ownership, sale, hire, agreement and so on in sets of facts presented to them just as Thomas wanted to see certain patterns in his enlarged photographs.

Moving from style to legal colonialism, Teemu Ruskola’s damning descriptions of how American jurists and others have characterized Chinese law and culture were researched without any need to refer to film studies in order to fashion his legal Orientalism thesis. Yet what is valuable about bringing together Ruskola’s text with Christopher Frayling’s analysis of orientalism in the cinema is that it shows how the notion that lawyers and jurists are ideologically neutral and scientific in their scholarship is little short of nonsense. Some of the jurists quoted by Ruskola are as racist as the makers of the Fu Manchu films. No doubt to make such a comment is to attract the criticism of indulging in a “jurisprudence of despair,” but the jurisprudence of non-despair seems, in itself, nothing but a plea to return to some more golden formalist age. Film scholarship can help comparative lawyers to appreciate that a movement like that of neo-formalism is really just an exercise in nostalgia and pastiche. It is the neo-formalists who are, perhaps, in despair (or perhaps in denial). Whatever the criticisms levelled against the neo-noir films, it would probably be a little ludicrous to suggest that cinema should return to the kind of visual and narrative forms that characterized the 1940s.¹³⁰ Is there not something a little ludicrous in suggesting that legal scholarship should return to the 1960s?

Film scholarship might, therefore, help academic lawyers see themselves in a more realistic way. So while there may well be aspects of cinema writing that are weak in its theory underpinning and too florid and methodologically undisciplined on occasions, it can throw

¹²⁸ Durgnat, *supra* note 38, at 50 (emphasis in original).

¹²⁹ *Id.* at 60.

¹³⁰ It may often seem that there are films which adopt the style of a past era. One thinks for example of Todd Haynes’s *Far from Heaven* (2002), which deliberately adopts the style of a Douglas Sirk film and reworks the narrative of Sirk’s *All That Heaven Allows* (1955). However as Richard Dyer says, Haynes’s film is “inescapably poised between a sense of telling a 1950s story in a 1950s way and a recognition that a 1950s way could not tell that story and remain a 1950s way”; Dyer, *supra* note 80, at 177. A similar point could be made about Roman Polanski’s *Chinatown* (1970).

a refreshing light on legal scholarship, and on some comparative legal scholarship in particular. It ought to remind legal scholars that they are working within a discipline that is not just largely backward-looking but backward-looking in a way that is anti-historical when compared to film studies. Few law students learn about the jurists who over the last two millennia have constructed their discipline and this has resulted in an absence of any serious debates about this tradition. And almost no students learn about the ideology of judges in the past. Thus, when a professor of comparative law impliedly suggests that we in Britain should return to the 1960s, it seems to occur to none of her colleagues what is being suggested. Do we really want to return to an era without first examining in some detail the ideologies and social beliefs of the judiciary of that period? Or, indeed, the ideologies of the academic lawyers of the time? How might such judges have reacted to issues of slavery and racism? What did they think about Chinese culture? If one wants an insight into 1960s attitudes, *Blow-Up* (1966) itself will remind the viewer of the rampant sexism and homophobia of the time. Raymond Durnat had no qualms about taking apart the standard of work produced by the film writers of the period both before and during his time.¹³¹ It may be that some of his quite devastating criticisms were themselves not beyond criticism, but at least there was and is a healthy debate. In the world of legal academia, serious critical analysis of law's historical tradition is pursued only by a few scholars, such as Professor Monateri who has the learning to talk in an authoritative and critical way about the history of the civil law.¹³² Yet few modern civil law students would be in a position to know what he is talking about given the influence of formalism.¹³³ As for students in the common law world, many are being taught, with some honorable exceptions, to dream of the 1960s (or even the late nineteenth century). And all this is described as “new directions.”¹³⁴

¹³¹ See generally Durnat, *supra* note 38.

¹³² See, e.g., Monateri, *supra* note 104.

¹³³ Christian Atias, *Questions et réponses en droit* 205 (2009) (“There are a good many histories of law; everything happens as if the law had no history. It is studied, and correlatively is formed, outside of time.”).

¹³⁴ See, e.g., *New Directions in Private Law Theory* (2021) (<https://www.ucl.ac.uk/laws/news/2020/jun/new-directions-private-law-theory-conference-ucl-laws-adopted-sls-annual-seminar-2021>).