

INTRODUCTION

## Where the ‘Real Action’ Is: From Comparative Law to Cosmopolitan Jurisprudence

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### I A COSMOPOLITAN JURISPRUDENCE

In his 2005 work *Black Whole Conference* (Image 1), Montreal artist Michel de Broin arranges chairs into an austere and solemn black sphere. Chairs, especially conference chairs, art critic Bernard Schütze writes about this piece, insinuate communication, collective discussion; the shape of the sphere, without beginning and end, and with each chair positioned equidistant from the centre, appears to create a ‘public sphere’ and conditions allowing for an ideal speech situation: ‘[H]ierarchy is abolished and central authority is evacuated.’<sup>1</sup> The centre cannot hold? Here, the centre is empty, and yet nothing falls apart.

Can law be imagined thus, de-centred, as an organic, self-sustaining yet open discourse without beginnings and ends, without borders? Can it be theorized successfully without the central concepts of authority, power, force – and should it be? Patrick Glenn was one of the scholars who had the ambition and courage to try. His belief in the possibility of dialogue and in the potential to negotiate conflict crystallized in his concept of ‘tradition’. He believed in the possibility of a peaceful coexistence in which traditions engage in perpetual exchange and yet maintain their distinctive identities – a vision, without notions of hierarchy and dominance, of a global ‘sustainable diversity’ of traditions (in the plural) in which the division between centre and periphery has collapsed.

Understanding law as ‘tradition(s)’, however, allowed Patrick to take another step. Himself a participant in the discursive tradition of comparative law, he meant to free this troubled sub-discipline from the conventional, self-imposed limitation of using the legal ‘systems’ of nation states as ‘units of comparison’ and thus the nation state as

<sup>\*</sup> Some of the reflections offered here were presented on the occasion of a plenary panel in memory of H Patrick Glenn at the 2018 Congress of the International Academy of Comparative Law in Fukuoka; I am grateful to the Academy for the invitation and to Vivian Curran for initiating this event. For comments, research, and editing assistance I am grateful to Jennifer Anderson, Alicia Krausewitz, Amber Lynch, Alex McPhail, and Shona Musimbe.

<sup>1</sup> Bernard Schütze, ‘On Michel de Broin’s “Black Whole Conference”’ <<https://micheldebroin.org/en/works/black-whole-conference-i-2>>.

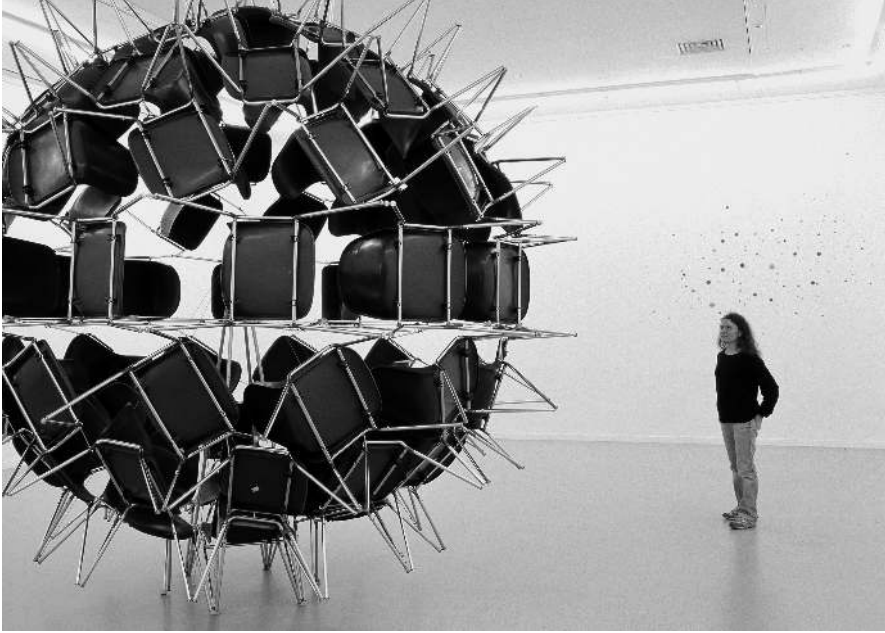


IMAGE 1 Michel de Broin, *Black Whole Conference* (2005). Collection du Musée d'art contemporain du Val-de-Marne, France

its foremost reference point. Yet this fixation on the nation state and its positive law, he found, did not only unduly limit the understanding of 'comparative law'; it held back Western thought about law in its entirety. As William Twining also points out in his foreword,<sup>2</sup> Patrick's suggestion to conceptualize law without relying on the nation state as its reference point had the jurisprudential ambition to offer a theory about law, and not just about 'comparative law', especially as an alternative to positivist theories.

Patrick's target was a tradition of methodological nationalism in law. This aspect of his work, in particular, showed a remarkable sensitivity to the theoretical developments that had begun to question methodological nationalism across disciplines in the preceding decades; and this aspect is also, I believe, a theoretical reflection of a genuine optimism and belief in the possibility of a peaceful coexistence through 'sustainable diversity' that characterized Patrick as a person. Hence this book's substantive focus on these theoretical aspects of Patrick's work, and on his ambition to which the book owes its title: daring to conceive of his own *Cosmopolitan Jurisprudence*. In the historical process of slowly overcoming the Westphalian matrix of statehood factually and theoretically, 'cosmopolitan legal theory', as he called it in his very last article

<sup>2</sup> William Twining, 'Foreword', in this volume.

(posthumously published in 2016), would 'play the role of a "critical theory" in presenting alternatives to current forms of normativity, whatever their forms.'<sup>3</sup>

From an anthropological perspective, Ulf Hannerz once described cosmopolitanism, in a now often-cited definition, as 'first of all an orientation, a willingness to engage with the Other' that is premised on an intellectual openness to diversity itself.<sup>4</sup> This definition beautifully captures what to me seems to be animating Patrick Glenn's cosmopolitan aspirations; it also hands us the key to a better understanding of the role that 'comparative law' plays in this vision. For Patrick, the practice of 'comparative law', or maybe more accurately, of *being* a comparative thinker indeed is pivotal in that it defines the epistemological starting point of his intellectual enterprise: to never think in terms of only one national tradition, of only one methodological framework, of only one belief or value system. Thus embracing, *absolutely*, the relativity of perspective would open up the possibility of recognizing oneself in the other and would pave the way to an understanding of 'comparison' far beyond traditional 'comparative' analysis. As Patrick put it:

Why was comparative law a distinct, marginal and boring discipline for the nineteenth and twentieth centuries? It was distinct because it was constructed as separate from the law itself, and as something which followed it (like the cigarette after sex, in the old movies). *It was marginal because people are more interested in the real action than what follows it.* It was boring for all of the above.<sup>5</sup>

Patrick wanted to make 'comparative law' sexy again. And he wanted to bring it where the 'real action' is: he wanted to demonstrate its foundational role for the very concept of law itself and change, in the process, our understanding of what 'comparative law' is and could be.<sup>6</sup> 'Comparative law' would thus no longer be relegated to the role of the 'boring afterthought' but could actualize its potential to contribute to the discourses on 'globalization' and 'multiculturalism' which, in the last decades of the twentieth century, had shown that the prevailing methodological nationalism was simply inadequate to meet the challenges of the 'cosmopolitan condition' (Ulrich Beck).<sup>7</sup> Patrick hoped that grasping this potential of a 'comparative' (ie, a not stationary and static) perspective would prepare the ground for nothing less than a new cosmopolitan understanding of law. Thinking in terms of 'sustainable diversity', 'conciliation', *convivencia* was his

<sup>3</sup> H Patrick Glenn, 'Differential Cosmopolitanism' (2016) 7 *TLT* 57, 69.

<sup>4</sup> Ulf Hannerz, 'Cosmopolitans and Locals in World Culture' (1990) 7 *Theory, Culture & Society* 237, 239. Of course, for Hannerz, the 'unit' of reference is 'culture'.

<sup>5</sup> H Patrick Glenn, 'Com-paring' in Esin Örüciü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 91 (my italics).

<sup>6</sup> Cf Richard Janda, 'Cosmopolitan Normative Information: Patrick Glenn's Legal Theory' (Intergentes 2016) <<http://intergentes.com/es/tag/richard-janda-es>>.

<sup>7</sup> Cf Ulrich Beck, 'The Cosmopolitan Condition: Why Methodological Nationalism Fails' (2007) 24 *Theory, Culture & Society* 286. See also Helge Dedek, 'Out of Site: Transnational Legal Culture(s)' in Peer Zumbansen (ed), *Oxford Handbook of Transnational Law* (OUP 2021) 89 <<https://ssrn.com/abstract=3678046>>.

alternative to the pessimistic essentialism that had gained currency in the 1990s, epitomized in the trope of the ‘clash of civilizations’.<sup>8</sup> In this vision, the incessant flow of information is not contained by national borders and the demarcation lines that are said to separate ‘cultures’ are blurry at best.

In contrast to the confrontative imagery of the ‘clash’, the sphere of *Black Whole Conference* may be interpreted as symbolizing the ideal of an unrestricted global discourse and of an indeed ‘cosmopolitan’ conversation. Yet, the sculpture prompts many more associations and interpretations. Its stark symmetrical arrangement is reminiscent of those wondrous geometrical structures that occur in nature yet only reveal themselves under the microscope: a diatom, perhaps? With the pandemic, our world has changed and our collective reference systems have shifted; and the legs of the chairs pointed outwards like spikes, *crown-like*, will most strongly stir the association of a virus – *the virus*. The reference to viruses, diatoms, or single-celled organisms trigger connotations of autopoietic self-assembly in the borderland between life and inanimate matter, of systems differentiating themselves from their environment. The sculpture’s title also hints to something that is complete in itself, even impenetrable, something the insides of which are unknowable from the outside. In *Black Whole Conference*, the delineation between the inside and outside of the system and its environment seems sharper than in the case of the tradition-concept as imagined by Patrick, where borders were always porous, and lines always fuzzy.

That living through a global pandemic inevitably brings to the fore, in the perception of the beholder, the connotation of the virus, also throws into relief the amplified challenges to a discursive, borderless, post-national view of the law in such difficult times. Never has our planet seemed smaller than during the pandemic; and never in recent memory have national borders been so hermetically closed and national authority so strongly reasserted on the entire planet as during the pandemic.

But it is not only national borders that keep the uninvited out. This cosmopolitan theory of law, this idealistic vision of inclusion, was being developed, critiqued, applauded, and disparaged within its own context of another microcosm: academia and its disciplinary sub-systems of ‘law’ and ‘comparative law’. It is academics who enjoy the scholarly leisure to think and reflect about law without direct involvement in violence and conflict, and to produce theories and discuss them at their global conferences – themselves forming a system that clearly defines inside and outside, with gatekeeper mechanisms that jealously guard the access points of speaker authorization and qualification.

We take another look at the imposing chair leg-spikes, evocative of a biological defence mechanism: the *Black Whole Conference* proceeds *à huis clos*. One cannot help but see the irony of a global class of tenured professors who are enamoured with

<sup>8</sup> Samuel P Huntington, ‘The Clash of Civilizations’ (1993) 72(3) *Foreign Aff* 22; Samuel P Huntington, ‘If Not Civilizations, What? Paradigms of the Post-Cold War World’ (1993) 72(5) *Foreign Aff* 186.

the language of inclusion and diversity yet rarely reflect the mechanisms that regulate the access to this rarefied group. It is an irony the thought of which Patrick Glenn, always open to critical self-reflection, would have, I hope, appreciated.

The sphere of interlocking conference chairs of the *Black Whole Conference* transposes into the realm of scholarly discourse a structure reminiscent<sup>9</sup> of the geodesic dome pictured on the cover of Patrick Glenn's *On Common Laws*<sup>10</sup>: R Buckminster Fuller's spherical US Pavilion (see Image 2),<sup>11</sup> designed for the 1967 Montreal world exposition 'Expo 67' that was held under the motto of "Terre des Hommes".<sup>12</sup>

Buckminster Fuller was (not unlike Patrick Glenn) an unabashed idealist; and he was (also in this regard, as some might say, not without similarities with Patrick)<sup>13</sup> a brilliant tinkerer and in many respects an autodidact.<sup>14</sup> A systems theorist of sorts,<sup>15</sup> he believed that 'the material world consisted of information patterns made manifest', and that by channelling and controlling this flow of information (through information technology and design) human agency was therefore instrumental in shaping the future of humanity.<sup>16</sup> As Fuller himself expressed it in his curious neologisms, he believed in the potential of human ingenuity to be redirected from 'killingry to advanced livingry – adequate for all humanity'.<sup>17</sup> Thus intended to contribute to 'transforming warfare to welfare',<sup>18</sup> Fuller's designs were

<sup>9</sup> On the piece evoking associations of 'the utopian geometry and spaceship dreams of a Buckminster Fuller' see also Schütze (n 1).

<sup>10</sup> The cover image can be viewed on the OUP website: <<https://global.oup.com/academic/product/on-common-laws-9780199287543?lang=en&cc=us>>.

<sup>11</sup> Rebecca Dalvesco, 'R Buckminster Fuller, the Expo '67 Pavilion and the Atoms for Peace Program' (2017) 50(5) *Leonardo* 486.

<sup>12</sup> The motto drew inspiration from Antoine de Saint-Exupéry's story *Terre des Hommes* and, in particular, the quote: "To be a man is to feel that by carrying one stone you contribute to building the world"; see Gabrielle Roy and Guy Robert, *Terres des Hommes/Man and His World* (Canadian Corporation for the World Exhibition 1967) 20ff.

<sup>13</sup> In his (as far as I know, unpublished) contribution to the Fukuoka panel in Patrick's honour, Ralf Michaels drew a connection between Patrick's work and the concept of 'amateurism' as expounded by Annalise Riles as a fruitful space of scholarly creation, see Annalise Riles, 'Legal Amateurism' Cornell Legal Studies Research Paper No. 16–41 <<https://ssrn.com/abstract=2859017>>.

<sup>14</sup> But see Fred Turner, 'A Technocrat for the Counterculture' in Hsiao-Yun Chu and Roberto G Trujillo (eds), *New Views on R Buckminster Fuller* (Stanford University Press 2009) 147, offering a critical perspective on how Fuller also exaggerated his position as an outsider to enhance his aura of non-conformity.

<sup>15</sup> Joachim Krausse, 'Thinking and Building: The Formation of R Buckminster Fuller's Key Concepts in "Lightful Houses"' in Chu and Trujillo (n 14) 73.

<sup>16</sup> Turner (n 14) 152. On Patrick Glenn's early fascination with the potential of information technology, see eg, H Patrick Glenn, 'The Use of Computers: Quantitative Case Law Analysis in Civil and Common Law' (1987) 36 *ICLQ* 360.

<sup>17</sup> R Buckminster Fuller, *Ideas and Integrity: A Spontaneous Autobiographical Disclosure* (Prentice Hall 1963) 249.

<sup>18</sup> Cf Junzi Huang, 'Science as Utopia: Infrastructures, Pedagogies, and the Prophecy of Design' in Thomas S Popkewitz and others (eds), *The International Emergence of Educational Sciences in the Post-World War Two Years* (Routledge 2021) 80ff.

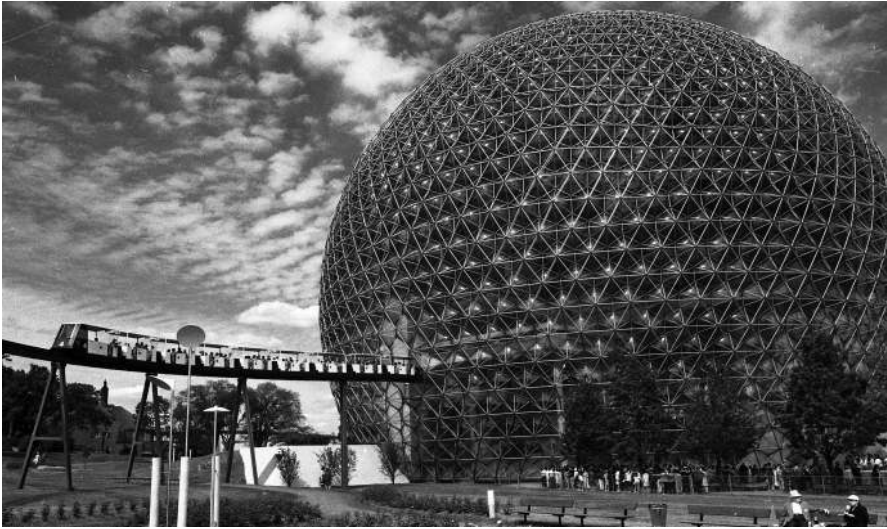


IMAGE 2 R Buckminster Fuller, US Pavilion, Expo 67, Montreal – Archives de la Ville de Montréal, VM94-EX136-779

part of a grand utopian vision of a peaceful human coexistence. Intended or not, the choice of the Expo 67 Pavilion for the cover of *On Common Laws* was thus one of a weighty symbolism – also in light of the fact that Fuller’s designs, at a time of an emerging peace movement and evolving social and ecological awareness, became counter-culture icons of a hopeful alternative modernism.<sup>19</sup> Patrick’s project was *modern* in the same way – despite his sense of humour and irony, there was no trace of ‘post-modern’ ironic detachment in his work; he was serious in his hope and optimism and in his belief in the constructive, real-world potential of a ‘cosmopolitan’ open-mindedness in legal thought.

However, if we look a little closer, we also notice that the cover image Patrick chose for *On Common Laws* shows Fuller’s American Expo 67 Pavilion not in its original but in its different current appearance. In 1976, the acrylic panels that constituted the outer skin of the dome were destroyed in a fire, and, against Fuller’s wishes, never restored.<sup>20</sup> What remains today (see Image 3) is the structure’s delicate steel latticework, the lack of the opaque solid border shell giving the dome an even heightened air of levity and transparency. With light passing through the structure unrefracted and air circulating freely between the inside and outside, the sphere’s boundary and has dissolved into a paradoxical – and thus very Glennian – borderline that has ceased to separate and to exclude.

<sup>19</sup> Felicity de Scott, *Architecture or Techno-Utopia: Politics After Modernism* (MIT Press 2007) 10.

<sup>20</sup> ‘History of the Biosphere’ (Government of Canada, 14 March 2017) <[www.canada.ca/en/environment-climate-change/services/biosphere/about/history.html](http://www.canada.ca/en/environment-climate-change/services/biosphere/about/history.html)>.



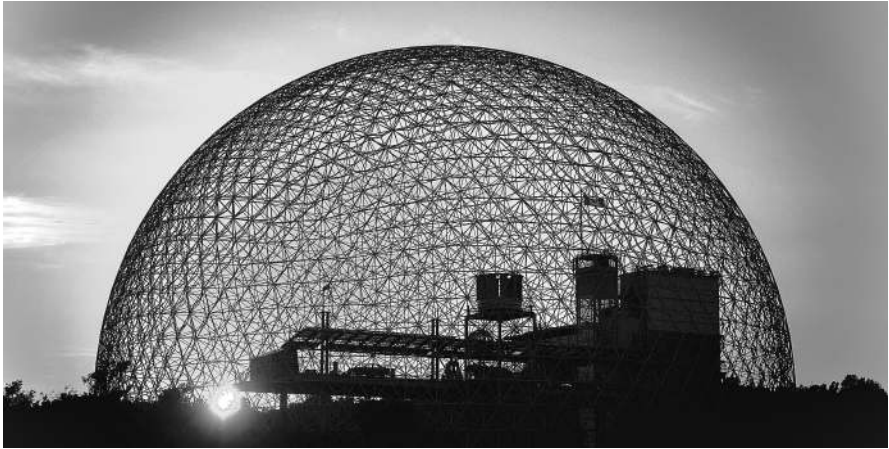


IMAGE 3 The US Expo 67 Pavilion, now called the 'Biosphere' and housing an environment museum (Photo: Guilherme Duarte Garcia, 2013)

The structure, as pictured on the cover of *On Common Laws*, is now called 'Biosphere' and houses an ecology museum run by Environment Canada: a federal institution that under the transparent, opened-up dome of the former US Pavilion now flies the Canadian flag.<sup>21</sup> I have always thought that Patrick's 'willingness to engage with the Other' was not only animated by the cosmopolitanism of the globetrotting comparatist but also by the specifically Canadian approach to diversity *within* that is so very much part of a certain Canadian self-image<sup>22</sup>; a diversity embraced by an approach to 'multiculturalism'<sup>23</sup> (implemented as an official 'policy' as early as 1971)<sup>24</sup> which envisioned a plurality of cultural identities within one Canadian identity and thus aspired to the ideal of the 'mosaic' – as opposed to a 'melting pot' of assimilation.<sup>25</sup> It is striking that the political architect of the policy of multiculturalism, Pierre Elliott Trudeau, imagined as the vessel for this diverse

<sup>21</sup> 'The Biosphere' (*Government of Canada*, 5 June 2020) <[www.canada.ca/en/environment-climate-change/services/biosphere.html](http://www.canada.ca/en/environment-climate-change/services/biosphere.html)>.

<sup>22</sup> See, from a critical perspective, David Austin, 'Narratives of Power: Historical Mythologies in Contemporary Québec and Canada' (2010) 52 *Race & Class* 19.

<sup>23</sup> On the specifically Quebecois alternative vision of 'interculturalism' see Gérard Bouchard, 'What Is Interculturalism?' (2011) 56 *McGill LJ* 435; Gérard Bouchard, *Interculturalism: A View from Quebec* (University of Toronto Press 2015); Charles Taylor, 'Interculturalism or Multiculturalism?' (2012) 38 *Philosophy and Social Criticism* 413.

<sup>24</sup> Cf the 'Announcement of Implementation of Policy of Multiculturalism within Biligual Framework' by Prime Minister Pierre Elliott Trudeau on 8 October 1971, Canada, Parliament, House of Commons, Debates, 28th Parliament, 3rd sess, vol VIII (1971) 8545. See eg, Will Kymlicka, 'Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique?' (2003) 13 *Const Forum* 1.

<sup>25</sup> For a critical assessment of this vision from various disciplinary perspectives, see: Keith Banting and Will Kymlicka, 'Canadian Multiculturalism: Global Anxieties and Local Debates' (2010) 23 *British Journal of Canadian Studies* 43; Howard Palmer, 'Mosaic Versus Melting Pot? Immigration and



and ‘just’<sup>26</sup> society a Canadian state that transcended traditional notions of the nation state and national sovereignty<sup>27</sup> – indeed a *cosmopolitan* state.

Montreal, where the geodesic dome is a well-established landmark, is an exceptional environment to experience the urban reality of an ‘internal cosmopolitanism’ not as an idealistic vision or top-down policy but as a social fact: a ‘cosmopolitanism by default’, as it has been called.<sup>28</sup> Patrick had a connection to this city that spanned more than four decades; both he and his wife Jane Glenn taught at McGill’s Faculty of Law in Montreal beginning in 1971. It is also in the light of this connection that I hope that Patrick would have appreciated the link with a work of artist Michel de Broin, whose pieces have a major presence in Montreal’s public space – pieces whose ‘dizzy logic’<sup>29</sup> would have been a good fit, I think, for Patrick’s knack and passion for exploring unconventional ideas and non-traditional logics.

Patrick Glenn, unexpectedly, far too early, passed away on 1 October, 2014. This collection of essays aims to honour him as a colleague, interlocutor and friend, and to reflect upon his intellectual achievements.

## II CRITICAL ENGAGEMENT

Patrick’s work has been widely praised, won awards, made its way into the ‘mainstream’ of comparative law, and also caught the attention of neighbouring disciplines such as legal history and legal theory. It has also given rise to (at times harsh) criticism, for obvious reasons: his project was extremely – maybe too – ambitious. With respect to their thrust and ambition, Patrick’s writings are admirable in their coherence and consistency. At the same time, Patrick was, as a theorist, unrestricted by the allegiance to a singular disciplinary perspective or school of thought, and his reflections drew eclectically from many disciplines and literatures. Consider, for example, the publisher’s description of his last book, *The Cosmopolitan State*<sup>30</sup>: ‘[The] interdisciplinary approach combines constitutional law, history, political

Ethnicity in Canada and the United States’ (1976) 31 *International Journal* 488; Ceri Peach, ‘The Mosaic Versus the Melting Pot: Canada and the USA’ (2005) 121 *Scottish Geographical Journal* 3. In his critical analysis, Cecil Foster has described the ‘mosaic’ thus: ‘Canada would be recognized as a conceptual barbarian that is a composite: a unity with many different parts, with, in the Hegelian sense, the official recognition of different darkneses that come together – not to occlude the light – but to synchronize it into a single beam that is miraculously pure White light’ – Cecil Foster, *Blackness and Modernity. The Colour of Humanity and the Quest for Freedom* (McGill-Queen’s UP 2007) 344.

<sup>26</sup> For a contemporaneous critical perspective on Trudeau’s political slogan/vision of a ‘Just Society’, see only the famous response by Cree writer Harold Cardinal, *The Unjust Society* (Douglas & McIntyre 1969).

<sup>27</sup> Cf Pierre Elliott Trudeau, *The Essential Trudeau* (Ron Graham ed, McClelland & Stewart 1998) 112.

<sup>28</sup> Annick Germain and Martha Radice, ‘Cosmopolitanism by Default: Public Sociability in Montréal’ in Jon Binnie and others (eds), *Cosmopolitan Urbanism* (Routledge 2005) 112, 125.

<sup>29</sup> Byrne McLaughlin, ‘Review: Michel de Broin, Montreal, at Musée d’art contemporain’ (*Art in America*, 27 November 2013) <[www.artnews.com/art-in-america/aia-reviews/michel-de-broin-61583](http://www.artnews.com/art-in-america/aia-reviews/michel-de-broin-61583)>.

<sup>30</sup> H Patrick Glenn, *The Cosmopolitan State* (OUP 2013) (hereafter Glenn, *TCS*).

theory, international relations, and new logics to provide a clear picture of current thought.<sup>31</sup> Even more challenging was his attempt to reconcile his ideas on law as 'tradition' with an overwhelming mass of empirical data about the laws grouped together into traditions.<sup>32</sup> This indefatigable curiosity in how others are doing and thinking law brings to mind Ulf Hannerz's observation that, indeed, 'cosmopolitans should ideally be foxes rather than hedgehogs'.<sup>33</sup>

William Twining opined that given the scope of such an endeavour, errors seem inevitable, and that, in light of the project's intellectual courage, '[t]here is also room for some, but not too much, charity in interpretation.'<sup>34</sup> Others have not been so kind. In an academic world characterized by increasing specialization and professionalization, it is unsurprising that critics have even gone so far as to call into question the quality of Patrick Glenn's work as 'serious' scholarship.<sup>35</sup>

There is no way around it: Patrick's work strongly polarized readers. It is, I believe, indeed almost impossible to read Glenn without objections, without at least being slightly irritated: not only with regard to his work on specific traditions but also, and, in particular, with respect to the theoretical basis of his work. Yet, I submit that it is precisely this irritating and disruptive quality that has been critical in jolting a self-referential discourse out of a cycle of replicating identical language games; and I would suggest that one of the most important aspects of Patrick's legacy will be that his work has helped to start, and has contributed to, important and necessary conversations – and that it has the potential to keep doing so. The starting point might be disagreement; however, the process of clearly formulating what started out as a visceral response of dissent not only makes the reader appreciate Patrick's creativity and acute sensitivity to pressing issues, but it almost inevitably prompts further insight and opens doors for new ideas, even if the initial motivation was to contradict and refute a specific statement or claim. Andrew Halpin, writing about Patrick's work, said it best: 'The process of disagreeing with him always left one feeling that what had been learned by engaging with his work far exceeded the particular contribution offered in making a criticism of it.'<sup>36</sup>

Professor Halpin made this remark in his contribution to a book on *The New Logics*. Begun as a project by Patrick and finished posthumously by my colleague Lionel Smith, this collection is one of the expeditions into a theoretical thicket – law

<sup>31</sup> See the promotional text available on OUP's website: <<https://global.oup.com/academic/product/the-cosmopolitan-state-9780199682423?q=Cosmopolitan%20state&lang=en&cc=us>>.

<sup>32</sup> H Patrick Glenn, *Legal Traditions of the World* (5th edn, OUP 2014) (hereafter Glenn, *LTW*).

<sup>33</sup> Hannerz (n 4).

<sup>34</sup> William Twining, 'Glenn on Tradition: An Overview' (2006) 1 *JCL* 107, 109.

<sup>35</sup> Cf James Q Whitman, "'A Simple Story'", Review of *Legal Traditions of the World* (2004) 4 *Rechtsgeschichte/Legal Hist* 206 – a criticism that Professor Whitman has – in an admirable display of frankness, tact, and character – by now withdrawn, see James Q Whitman, 'The Hunt for Truth in Comparative Law' in Helge Dedek and Franz Werro (eds), *What We Write About When We Write About Comparative Law, an AJCL Special Issue* (Supp 2017) 65 *Am J Comp L* 181.

<sup>36</sup> Andrew Halpin, 'The Application of Bivalent Logic, and the Misapplication of Multivalent Logic to Law' in H Patrick Glenn and Lionel D Smith (eds), *Law and the New Logics* (CUP 2017) 208.