BOOK REVIEW ESSAY

WAYS AND MEANS OF TEACHING FOREIGN LAW:

A Review of James Gordley & Arthur Taylor von Mehren's
An Introduction to the Comparative Study of Private Law: Readings, Cases Materials.
Cambridge University Press
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Sir Basil Markesinis*

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I. THE AUTHORS

For some reason, not entirely clear to me, reviewers of books find it easier to be critical, often severe, with the books and the authors they review. To express one's admiration seems to happen less frequently, perhaps, because it may be taken as a sign of partiality or weakness, perhaps, because it is assumed that a favourable review is less likely to be reliable, useful, or stimulating. I hope none of these assumptions is true for reviewing a work of a colleague who is no longer with us but with whom I taught in Cambridge, England, when he joined my course as Goodhart Professor of Legal Science and then had the pleasure of teaching with him in his own course in the newer but equally—more

* QC, Fellow of the British Academy, Corresponding Fellow of the French Academy, and Foreign Fellow of the Academia dei Lincei (Rome) and Athens, and Jamail Regents Chair of Law, University of Texas at Austin.

some would say—distinguished Cambridge. All this bring back wonderful memories of the man and the scholar. For Arthur von Mehren was a quiet spoken man who did not overwhelm his younger colleagues with his learning but let it seep to the surface naturally and spread and impress his interlocutors, for it was both wide and deep. He combined this intellectual interaction with a dry sense of humour which I experienced when I first visited him at Harvard and he and his wife Joan (hospitable as ever) took me out for "a spin" in the car during my first week-end at Harvard. He choose to show me Lexington and Concord and point to a sign, I think it was at the place of the famous battlefield, which proclaimed that "here the *invader* was first defeated". There was an ever-so-slight sign of a grin when he uttered that it was "your ancestors who were the invaders" which gave me the pleasure to retort that though a British citizen I was Greek and Venetian in origin!

Arthur was more than just a great host of an endless stream of friends whom he entertained at Harvard. He was a man with wide interests having written not only on matters of comparative law but also on matters of conflicts and selflessly gave his time and expertise to anyone who sought his advice and guidance. His very high record of citations shows not only how learned his works were but also how useful they were to others. And Arthur could also claim another first for, I believe, early in his career he was specially chosen by Harvard to be sent abroad and learn foreign law *in situ* and then return and teach it at his famous Law School. I do not know how true the story is, for Harvard had always enjoyed a great tradition of comparative lawyers, including of course Roscoe Pound who did so much to make foreign, especially German legal thinking of the turn of the 20th century, widely known in the USA. The product of such an environment, such background training, and such a natural intelligence and ability in languages combined to produce *The Civil Law System. Cases and Materials for the Comparative Study of the Law* which first saw the light of day in 1957, published, in those days, by Little Brown.

Twenty years later the second edition appeared, not just updated but enriched by the contributions of the rapidly emerging star of James Gordley and which, for a few more years, made this book one of less than a handful of a kind that commanded the interest of the teachers, especially in the USA. That teachers of the subject are now faced with a profusion of books of very different kinds which try to interest readers in the study of foreign law is, I am sure, to no small degree thanks to Arthur's foresight, including his choice of James Gordley as co-author and, eventual, successor.

A further thirty years have steamed by and "the King is dead". Yet, as the old English adage comfortingly assures is, the king may be dead but: "God Save the King". The man now in charge is one of the most cultured colleagues I have come across in a forty year career that has taken me to twenty five major law faculties and given me the—literally—unique pleasure of meeting some of the greatest names in the field of comparative law. James Gordley is there at the top, for few of us can claim the enviable expertise in (comparative) legal history, philosophy, especially philosophy of law and, of course, comparative law proper the way he can. His stewardship of this great book is marked by another distinction, having acquired the endorsement of Reinhard Zimmermann, yet another of those formidable German polymaths, who introduces this third edition to its readers. Professor Gordley, as always modest and self-effacing, claims that this edition owes much to its progenitor. No doubt it does; but to those who have followed this book from its birth to adulthood, it has also changed and not grown old. For this we have to credit the new author-editor; and, straight away, he earns our admiration and not only our thanks. For there is much new raw material, mainly decisions (but also codal texts) and other extracts, which were not here before and of which, in the absence of any contrary indication, we must again assume he is their translator. Not that languages were ever an obstacle for James Gordley since I believe I am right in saying that he is at least quadrilingual. Nonetheless, having edited and annotated two large case books myself on the *German Law of Contract* and *Tort* I know the difficulty of striking the right balance between a translation which is literal but, at times, almost incomprehensible and one where style gains the upper hand, but fidelity to the original slips out of view.

II. THE BOOK

The book is divided into two main sections: the introductory readings, which take up 137 pages, and what one might describe as the main section, which is sub-divided into four parts: property, tort, contract and unjust enrichment. These are discussed in 429 pages. The first section consists mainly of extracts from other works which deal with Roman law and English law, the codification movement first in France and then in Germany, how this was seen by the original drafters, the early generations who had to deal with these (allegedly all-embracing summaries of the rules of private law) and then there is a third sub-section, entitled "Institutions" and dealing with miscellaneous topics such as the development of the modern European systems, the German

model of civil procedure, and the European Union. Here and there, they are also supplemented by short but very clearly written notes by Professor Gordley.

The property part of the second section, unusual in a case book for (mainly) American students of comparative law, deals, inter alia, with such issues as wild animals, rights to natural resources, treasure trove, as well as the legal remedies available for protecting possession. A discussion of ownership and rights lesser than full property (such as servitudes or the regulation of neighbourhood relations—which English Common lawyers, focusing historically on wrongs rather than rights, see them as pertaining to the law of tort and discuss under the tort of nuisance—and a cluster of issues associated with necessity, especially in the context of land use, close this section.

Tort law follows and, again, the arrangement is unusual, intriguing and, as we shall see, debatable in parts. It begins, naturally enough, with what the authors call the structure of tort law, is followed by harms to dignity—a special sub-section afterwards focuses on privacy—and then an important sub-section deals with pure economic harm. The mens rea of tort law is then discussed, first intention, then carelessness—the author uses the term Negligence but I would avoid it because it is easily confused with the tort of the same name—strict liability closing this discussion.

Contract comes next and, naturally enough, it begins with the human will, the coincidence of wills, and its vitiating elements. A discussion on fairness comes next, followed by non-performance and remedies. The difficult section on what we call restitution but, nowadays, largely accept to be based on the idea of unjustified enrichment, is also sub-divided into sections which deal, first with cases of unjustified enrichment where the plaintiff did not lose, and then are followed by cases where it is doubtful as to what the defendant gained.

In all these section the bulk of the information given refers to English, American law, French, and German law. The arrangement of the sub-headings and the terminology tries to accommodate different systems, different languages, different notions so sometimes Gordley veers towards accepting the French approach, sometimes, the German (and, indirectly, the Roman). Having decided to cover so many systems and so many branches of each system, his obligation to make choices was inevitable but not enviable. Thus, to me the sections on dignity and privacy display a Germanic influence and, if I am right in so detecting this, I, personally, applaud it since I find German law on this topic more developed, more nuanced, and more balanced than all of the other

alternatives namely the English (which is too casuistic and restrictive), the French which over-protects privacy at the expense of speech (even in cases of genuine public interest) and American which is guilty of the exact opposite sin. On the other hand the material here may prove perplexing to a Common lawyer as it veers from torts to crimes and constitutional law, reflecting the different German (Roman) origins of some of these wrongs.

I think I detect the same Germanic influence in the sub-section entitled as "non-performance", at least as far as the term/heading is concerned, even though the 2001 reforms of the German Civil Code moved away from the traditional and unfortunate division of "impossibility" and "delay" (some have argued as a result of misunderstanding Roman texts) to the more unified notion of breach which we find in the Common law.

Compromises also had to be made upon the amount of space given to some other topics. As a result, the proverbial observer from Mars would not, judging from the space devoted to the recovery through tort of negligently inflicted pure economic loss, thus get any idea of (a) how problematic this topic is in the Common law and German law; (b) why it causes (or seems to cause no practical problems or theoretical concerns) to the French-inspired systems; (c) what are the policy reasons that worry so much the Anglo-Germanic systems but leave the bulk indifferent; and (d) how those who dislike compensation of such harm through tort manage to achieve it by putting on the Procrustean bed other parts of their private law—such as the law of contract, the law of unjust enrichment, the law of the wills and so on—and often ending with comparable answers despite the initial differences.[1]

Likewise, short is the discussion of the other kinds of physical harm which provide the stock diet of tort cases in England and the USA. As stated, considerations of space always force authors to cut out (or curtail) the discussion of some material; but here the omission is regrettable since the material on some of these subjects gives one the chance not only to provide the substantive rules of tort law but link them with the use of juries and the effect they have on the issue of quantum of damages. Compression also affects clarity or, to put it more accurately, it shifts the burden of clarification and precision from the author onto the teacher who is using this book. For instance, one could mention here Professor Gordley's treatment of emotional distress (see pp. 322 ff)

1. The manifold issues are discussed by Mauro Bussani and Vernon Valentine Palmer in *Pure Economic Loss in Europe* (Cambridge University Press 2003).

where, for instance, the retrenchments from *Dillon v. Legg*[2] are discussed in fourteen lines leaving little room for them to be discussed or compared with the *largesse* that other systems can display towards this type of harm.

Finally, in the same vein, harm to a foetus (and the mother and father), handled so differently in American and Continental European law, seem to have been sacrificed to the same unremitting pressures of space as are also absent actions for wrongful life and birth. Yet these, too, provide interesting comparisons with the rich and varied (especially) German material, as well as an opportunity to give the scholar using this book as a teaching tool the chance to show his students how private law has "grown" out of constitutional developments—the liberalization of abortion law in the 1970s—but how it may also "shrivel" if the current hyper-conservative trend to reduce the effect of *Roe v. Wade*[3] continues un-abated. All of these are interesting topics of tort law, especially interesting because some of them (emotional distress and fetal injuries for instance) excite much debate in some systems (mainly Anglo-American) but next to none in others (e.g., German) but also because they make the novice realize that in one set of systems they are handled as problems of "duty" whereas in others they are seen as raising issues of "causation". For me this last observation is of particular interest to comparative lawyers since it shows that the problems are often the same, the answers can be analogous or different, but what is really different and, to begin off-putting, is the conceptualism and arrangement of the law by the different legal systems. Learn how to overcome these "artificial" hurdles of classification, often the result of history or accident rather than imperious necessity, and you have already made a big step forward in not only comparing different systems but also understanding them.

One can only conclude this sub-section by re-iterating the sound principle that, at the end of the day, it is for the author to decide what he includes in his book and what he (reluctantly) has to omit or abridge. The same observation applies to how detailed and up-to-date he chooses to make his own supplementing notes to his judicial extracts. On the other hand it must equally be the reviewer's prerogative to ask deferentially yet firmly "would it not have been better to save space by omitting the references here and there to Roman law on the grounds that they are only of sentimental value and use it instead to expand the

2. 441 P.2d 912 (Cal. 1968).
3. 410 U.S. 113, 93 S. Ct. 705 (1973).

comparison with, for instance, German law which in all these instances has come up with interesting, novel, and even transplantable solutions?"

Having said this (because I believe it to be true) I also feel somewhat guilty in "chiding" (in a friendly manner) Professor Gordley for allowing his interest in legal history to be revealed more expansively than contemporary explanations of legal solutions. If one needs another illustration of this personal predilection of his, one finds it in pages 308-312 where one finds a clear, historical, and dogmatic explanation why negligently inflicted pure economic loss was excluded from the domain of tort law in Germany, England, and America but finds nothing about insurance arguments which played such a vital part in the opinion of the Supreme Court of Canada in *Canadian National Railways Co. v. Norsk Pacific Steamship Co. Ltd.*[4] It would thus seem that like Goethe's Faust,[5] Professor Gordley has two souls—don't we all?—that pull him in different directions: the past and the present. It would also seem that when that happens, he is much happier in the first world than in the second. *De gustibus non disputantur* so let us leave this point there to rest!

III. CHOICES LEADING TO (INTRIGUING) OMISSIONS

Updating such a classic Casebook involved some difficult decisions so we must now turn and look briefly at the contents of this book. These decisions are forced upon an author by many factors: change of law, change in interests, and change in the socio-economic environment. The list is endless; and the way to accommodate these different needs infinitely variable. But the most ruthless dictates as to how to accommodate the growing new material come from the realization that printing space is not unlimited. The struggle what to keep, what to add, and what to skip altogether is one which every author who has had to cope with new editions knows well; and it is not an easy one to handle. Cutting out material, especially, if you have written it yourself is rarely easy; and it can become agonizingly difficult—which has happened to me once—when you wish to exercise ideas which you no longer hold but which in the meantime have been accepted by a court of law!

Yet omissions there will always be; and they raise equal (in weight if different in nature) problems for the reviewer of a book. For though, as stated, the reviewer should allow the author the freedom to cover his

4. [1992] 91 DLR 4th 289.

5. "Two souls there dwell, alas, within my breast, and one would cut itself away from the other; one of them clutches with lustful senses at the world it loves, the other rises powerfully from the dust to reach the fields of lofty ancestors." Faust, pt. II, 1112-7.

subject in the way he sees fit he must, surely, be entitled to comment on what the author has chosen to leave out of his book. The danger here is that the reviewer will interpret the omissions in a way which may not be consistent to the author's own thoughts. The omissions I would like to touch upon relate to the kind of wider, ideological issues which underlie the study of foreign law and dictate the method one chooses to employ in order to present it to his own people. These are thus the topics which make our subject exciting and controversial and can help spice up a review so long as the reviewer's interpretation of the authors "silence" is not extended to the latter. In short what follows is how I interpret Professor's Gordley's omissions and not what led him to opt for them. Before we turn to this fascinating topic let us, however, briefly mention what is covered by this book.

Professor Gordley has crammed an enormous amount of learning and information in this book; it would be unfair to criticize him for what he has chosen to omit. But if criticism is not in order, two or three comments are. This is for reasons which will become obvious both in this and the next sub-section. Here, then, are three, along with my reasons why I call them "intriguing".

A. The Omission of Public Law

Professor Gordley is fully aware that public law once figured in the earlier editions of this book; but something had to go and he decided that this was one of those subjects that could be omitted. Personally, I would have omitted the property section and even pruned the introductory material which, in my view, tries to do too much in too short a space. But these are matters of individual taste or interest so all I can do here is say why I, as a non-American, regret this omission. Many reasons can be given, but four will suffice.

First, when in America, during the second half of the nineties comparatists such a Professor Merryman[6] thought comparative law had hit the bottom, they had clearly miscalculated (a) the effects of globalization; (b) the rippled effect of numerous European projects to discover the core of European legal ideas as a preliminary step towards greater harmonization of law and, which is relevant here, (c) the outburst of scholarly activity in the areas of comparative public law, human rights in particular. To be sure, American law had always had the lead in the

6. Merryman, for instance, wrote that "[c]omparative law languishes in a narrow dungeon of its own construction, deprived of light and air by a conversely constricted academic vision". *Comparative Law Scholarship*, 21 HASTINGS INT'L & COMP. L. REV. 771, 784 (1998).

area of judicial review; and when, in the sixties and seventies, its Supreme Court started handing down its many liberty-enhancing decisions, it became the beacon of new ideas the world over. Since then, we have seen the retrenchment of the Rehnquist years, the emergence of other courts active on constitutional matters—such as that of Israel during the Barak years, the South African Constitutional Court, during the years of Chaskalson, Ackermann, Goldstone, and others, the European Court of Human Rights in Strasbourg—all of which have shown to the world, especially the newly liberated states of Eastern Europe, that there are now other models, besides the American, to copy and to follow. These were years of intellectual explosion in the domain of comparative constitutional law as the writings of May Ann Glendon, Ann Marie Slaughter, Cass Sunstein, Mark Tushnet, Vicki Jackson, Sanford Levinson, Bruce Ackerman, and many others, clearly show, making the Merryman language unfortunate to say the least. In volume alone—and one must be circumspect when talking of quality—these authors, in my view, took over comparative law from the private lawyers. And their interest was reflected in court judgments as a young Scalia appeared on the constitutional scene in the mid eighties and immediately set forth to challenge the liberals or switch voters of the Supreme Court.[7]

Secondly, this literature overlaps with the study of politics,[8] economics, international relations and thus gives us an excellent occasion to introduce a more inter-disciplinary approach to law without falling into the trap of anthropologists, post-modernists and all the other surviving off-shoots of the critical legal studies movement which, whatever else they may have accomplished in the American academe, they showed their irrelevance to comparative law. More about this in a minute but if one needs one, just one out of many, admirable examples of a collection of essays bringing all these three topics together and thus greatly enlightening the current comparative constitutional debates, think

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7. Thus, the opposition against recourse to foreign practices in the context of the Eighth Amendment, however peripheral, did not appear until *Thompson v. Oklahoma*, 487 U.S. 815, 869-70 (1988) (and prevailed one year later in *Stanford v. Kentucky*, 492 U.S. 361 (1989)) two years after the learned justice took his seat at the Supreme Court, ending the judicial era which had begun exactly thirty years earlier with *Tropp v. Dulles*, 356 U.S. 86 (1958), and which seemed to herald a certain openness to foreign ideas. Whether this ties in—it probably does—with the growing conservatism towards the end of the Reagan years, or whether this conservatism found in Justice Scalia the pugnacious proponent it had lacked thus far, or both, is not something that need concern us here. Yet the legal shifts which often follow changes in the political landscape can be of great interest to comparative lawyers when comparing legal systems and considering the transplantability of legal ideas.

8. As the previous note and the ideas mentioned (in passing) in it suggest.

of the collection of Essays by Michael Ignatief.[9] When I read collective works such as these, I envy—though not myself deprived of superb environments such as Cambridge, Oxford, and London where I served for forty years—and not decry—as the neo-conservatives do with such narrow mindedness—the concentration of talent which one finds in places like Harvard, Yale or Princeton. On the contrary, I applaud them and, if I may add to my many sins, I envy them.

Thirdly, these topics, these approaches, and these ideas, were subsequently espoused by senior judges as they battled on the Bench and extrajudicially supported the use of modern law, at least as a source of ideas—liberals—or vehemently opposing it as deforming the views of the American electorate. This is another and fascinating aspect that the public law aspect of comparative law adds to our subject and not only because we see it reflected in real decisions and not just in the academic cloisters but also because it has occupied some of the most brilliant judicial minds of our times: Scalia, Breyer, Posner, which should not lead us to forget the interesting but vitriolic outbursts of Judge Robert Bork or the restrained but important internationalism of Justice Sandra Day O'Connor or Justice Ruth Bader Ginsburg which I, for one, much admire.

Finally, because the debate on public law is increasingly touching upon private law as Gordley's present edition of the von Mehren book shows but, in my view, does not adequately explore. Here, I am not just referring to the constitutionalisation of defamation, privacy, abortion, wrongful life[10] but also, and more importantly, the indirect appeal of the neoconservatives—they call themselves "Americanists" as if the other inhabitants of the USA were un-American or anti- American—to make sure that the "internationalists" do not spread their wings too much even in matters of private law such as tort law, social security, accident compensation, labour law, landlord and tenant, employment law, employment discrimination. The (politically) little lamented John Bolton, just before, he assumed the public office he (recently) vacated, had this to say on this topic; and it is frightening for it shows that the neo-

9. AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatief ed., Princeton University Press 2005).

10. And in this sense I am surprised that decisions such as *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), are not even mentioned in the book as I regret the lack of all discussion of the phenomenon of constitutionalisation of private law which is happening everywhere in the world taking the form of the horizontal application of human rights. This may be unknown or, technically impossible in the USA, but from a comparative law point of view it is, I hope, an issue which will appear in the next edition of this book.

conservatives had within their sights even the traditional areas of private or commercial law in which an internationalist spirit has always prevailed. Thus, for instance, he argued:[11] "In substance field after field—human rights, labour, health, the environment, political-military affairs and international organisations—the Globalists have been advancing while Americanists have slept. Recent clashes in and around the United States Senate indicate that the Americanist part is awakened." This statement is notable for its breadth, since subjects are listed indicatively, not exclusively, and goes beyond the traditional public law/human rights discussions and touches upon all branches of the law which can, effectively, have an impact on American economic and commercial life. In my view, it thus lays the foundations for future generations of Americanists, invoking politico-economic arguments of self-interest to scupper legal borrowings or other attempts to provide the degree of legal harmonisation which modern commerce seems to require.

I said I would give four reasons why I regret the omission of constitutional law from a leading text book on comparative law but I will add one more—one which interests all who like me are interested in the way that (legal) ideas travel. For what I find remarkable is the unexpected cross fertilization of ideas which is happening between public lawyers and political scientists in the USA and . . . Germany. The notion, so contrary to the idea of "special relationship" between the USA and Britain, both in the political but also intellectual fields, is truly fascinating. And yet one only has to see the huge citations rates which a brilliant but otherwise so utterly unattractive personality as Carl Schmitt to realize that my throw-away line merits an article if not a book.

B. Ignoring the Trendy Wave of (Mainly) American Comparatists

As the critical legal studies movement lost the aura, such as it ever had, in the seventies and early eighties, it attempted an infiltration of the comparative law movement. One of its cries, was that comparative law in the USA was too Eurocentric and the time had come that American law should come out of the "shadow of Europe."[12] The book gives no sign

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11. *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 206 ff. (2000).

12. The less than fortunate expression belongs to Professor Mathias Reimann, a German born and admirably educated scholar. It appears in his *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. L. 637, 644 (1998). On the other hand, one finds this remarkable piece of self-contradiction in his *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 670, 691 (2002), the following statement: "[O]ne can indeed look across the Atlantic with *envy* [sic] . . . . Comparative law in Europe is a hot topic. It is *practically relevant*,

of it being aware of this movement, believing arguably, that it is best to ignore it and let it wither on the vine than to attack it. Likewise, it pays absolutely no attention to the call that the study of comparative law be extended to other lesser, exotic systems, sticking as we have seen firmly on three of the major progenitors of legal ideas and legal institutions, the Common law, German law and French (or Romanesque) law.

Again, one must applaud on a variety of different but practical grounds. First would work on such lesser systems be of use to practitioners, judges, or legislators? The answer is almost certainly negative. As it is, American courts are condemning the ideas coming out of major European courts as "fads and fashions"; words are difficult to imagine as to how they would react to ideas coming from lesser systems, young in age, restricted in geographical application, unsuitable to societies of a different socio and economic level of advancement than those where they were born. And then, of course, is the question of how one would access their information? Even the richest of American law libraries are being forced to contemplate economies; even the most talented centres of learning have few who can work with some of these languages; and that is not to mention the fact that the major American law schools are primarily professional schools not centres for liberal arts and are thus unlikely to contain students who would take such courses. In a world of limited resources, and even the rich United States of America belongs to this category now, limited resources must be distributed on a variety of criteria, need, demand, profile, reputation and many more. Teaching anthropology in law faculties or tribal law cannot have much of a future in the USA. Von Mehren and Gordley do not say this; with style and academic detachment, they are silent; but their silence can be interpreted in this way: why waste space and time on something essentially useless? And then, of course, is the question of language; the way we speak, the way we externalize our thoughts, the way we try to bring cultures closer together, not in a way that deforms them but in a way that enhances interest in them and makes us want to study them, even imitate them.

Recently, Professor Ugo Mattei, an intelligent and prolific Italian scholar who has some sympathy with these new schools, disarmingly admitted that the critical legal studies people tend to exaggerate in the language they use and thus weaken their own appeal. He alludes to the neologisms, their abstract words that only the initiates can understand,

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self confident, and enjoys a *high profile*" that does not sound like a shadow; not does it sound as something that should be avoided but, on the contrary, studied with a view to learning from it.

and comes close to admitting that they are a frustrated group since they are ignored by the comparative establishment to which of course both von Mehren and Gordley fully belong. This is how he puts it,[13] one must admit with admirable courage and elegance:

> "[C]ontributions [of the Critical Legal Studies comparatists] are sometimes difficult to fully appreciate [sic] and are easily misunderstood. The main reason for the resulting miscommunication is that the Critical Legal Studies comparatists often write and reason at high levels of abstraction and frequently borrow freely from particular intellectual traditions in neighbouring social sciences, putting the resulting scholarship well beyond the ken of many, if not most readers."

The same *crie de coeur* is obvious from the latest cry from the wilderness of Professor Pierre Legrand who complains that Professor Kötz never replies to his critics—one must assume he means primarily himself since he has devoted 85 pages in a recent issue of the *Cardozo Law Review* in attacking the great comparatist. Legrand's onslaught must have earned him a special place among the top list of incomprehensible and inelegant writers. In my view, the following extracted lines from his article,[14] earn him such accolade; and he should not wonder why Kötz does not reply; the more Legrand writes, the deeper he buries himself and his ideas.

> "Driven by a sense of philological responsibility; inspired by the interpretive value of close reading or reading-for-the-detail; aiming to grasp beyond Kötz's words what they effectively mean; animated by the (non-contradictory) view that utterances cannot simply be held to mean what the writer wanted them to mean; mindful that discursive structures must be analyzed as much for what they exclude or keep under erasure as for what they determine; subscribing to a hermeneutics of suspicion (more than to a hermeneutics of recovery); reluctant to concede the signifier's necessary supremacy over the signified; persuaded that cognitive rationality and sociality (in the sense of ideological and professional considerations) cannot be dissociated; governed by the conviction not that one is to examine how one can be an activist and be interested in comparative legal studies at the same time, but that one cannot help being an activist once one is interested in comparative legal studies; guided by the idea that, it can be very important and productive to ask questions the text does not encourage one to ask about it; and inspired by the dictates of charitable interpretation and indeed of respect for the text (which, again,

13. *Comparative Law and Critical Legal Studies*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 815, 822 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

14. Pierre Legrand, *Paradoxically, Derrida: For Comparative Legal Studies*, 27 CARDOZO L. REV. 631 ff (extracts from pages 639 ff, 648, 654) (2005).

> cannot mean that it is immune from critique), I propose to engage in three successive archaeological-cum-genealogical exercises in ascription of meaning and then suggest an explanation by drawing an analogy between Kötz and Descartes. . . . Hein Kötz's is comparative legal studies's actualized version of Descartes. Like his philosophical forebear, his principal goals—as notable as they are problematical—are foreclosure and withdrawal. I have already mentioned Kötz's refusal to engage with his critics. In this respect, Kötz is in effect definitely more Cartesian than Descartes himself who, although he claimed that 'anyone who understands [his opinions] correctly will have no occasion to dispute them' was perfectly happy to include along with the first edition of his *Meditations* (which ran for one-hundred-and-nine pages) fully four-hundred-and eighty-five pages of objections (to his text) and 'replies' (by himself). Perhaps Kötz and Descartes are closer when it comes to their defiance of erudition. . . . As they extol detachment, transcendence, distinctness, and clarity—in other words, rigor—Descartes and Kötz, unwittingly or not, promote an androcentric or phallogocentric model of knowledge. . . . In fact, though, Kötz speaks with the certainty that only not-knowing makes possible. . . . I argue that it is his blindness to his blindnesses that allows him to say what he says. . . . In the light of the interlogocentrism, internomocentrism, interobjectivity, and interscientificity characteristic of the field of comparative legal studies, it must suffice for me to offer a brief and somewhat arbitrary selection of examples illustrating within the great mimetic rivalry (so typical of the scholastic world and its discipleships) how the brand of 'not-knowledge' promoted by Hein Kötz continues to demand almost automatic deference and thus remains insistently published, read, and valued as 'good' comparative research by, gentlemen-comparatists whose amused interest in matters transnational can seemingly be teased only so far. . . ."

As stated, von Mehren and Gordley, are silent on this school of thought so the readers of their book can focus on learning useful things. But the reviewer can raise them for the younger colleagues must be shown from their early years examples of bad writing not only good; for as the great French Essayists, and thinker Michel de Montaigne once put it so elegantly, "a bad use of language corrects my own better than a good one."[15] The same goes for comparative law. For sometimes, one learns much by being exposed to some bad writing on this topic among which one of the most important is that "trendiness" is lethal to good scholarship.

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15. *On the Art of Conversation*, *in* THE COMPLETE ESSAYS 1045 (M.A. Screech trans., Penguin Books 1991).

C. Major Legal Systems Versus Inspiring Legal Systems

The book, in accordance with well-established practice, teaches comparative law by looking at three major legal systems—the Common law (divided into to two sections i.e., the English and the American, acknowledging the important differences between them), the French and the German. Authors like René David used to call them major or "grand" because they had helped shape almost all other systems, though some additional legal families were recognized, such as religious systems, Scandinavia systems, and mixed systems (e.g., South African, Israeli) to account for those who could not easily be fitted in the three "major" categories. The division was unsatisfactory; it depended on the classification of private law, ignoring public law, not in the limelight at the beginning of the 20th century when this classification mania began mainly in France, and certainly unaware of the latest trendy calls for comparatists to enlarge their vision so as to include primitive or lesser developed systems.

This reviewer was never a great fan of the idea that too much time should be spent on such classifications, not only because of the reasons given above but also because in many instances states had moved away from the genealogical ancestors to-wards other systems. Among these I would include Portugal and the Netherlands, both of whom have moved in many respects away from their French ancestry and closer to the gravitational power of Germany or America. Canada is another example since it still relies on English law for some parts of its law (property, obligations) but in others it has turned its gaze towards the USA. Japan, is also closer these days to the USA than to France or Germany which had, in the past, helped shape its laws. These shifts and nuances must be noted; and, perhaps, the adjective "major" should be dropped since now we have smaller countries, with a less long history of influence on others, but which have, rightly, become contenders for our attention. This does not mean, as some American comparatists have argued, that the three or four legal systems discussed here, are less crucial; nor does it mean that we can afford to waste time looking at tribal law or the legal rules of countries with a tiny geographical and political significance. But it does mean that the comparative work done by countries such as Canada, Israel, South Africa, will and should attract more of our attention than they have done thus far. In that sense, the monopoly of "les grands systèmes" has been dented even though their own productivity and wisdom provided a rich source of ideas.

Not that long ago, this reviewer set out his views in the *Tulane Law Review*[16] and even though he did so in a summary form, his objections and concerns could be compared to the calls of the trendy colleagues to widen indiscriminately our comparative law searches and then ask students of comparative law to engage further in this debate. Maybe Professor Gordley may consider including such material in the introductory section of the next edition of his book. In the opinion of this reviewer this will be the surest way towards making the discussion more meaningful; but the reader of books such as this will never reach this stage until he has been given the alternatives and asked to work out for himself both in scholarly and practical terms which of the two is feasible.

IV. Adding the Missing Parts of the Puzzle

The above points already give strong clues that scholars can differ not only on what they choose to say but also on how they prefer to say it. In this section, therefore, I do not wish to comment on what the author has chosen to omit from his discussion but on how he has chosen to discuss the topics/headings he finds worth discussion. To put it differently: can you give a Stradivarius to a novice and then expect him unaided to produce sublime music? In more direct terms, the rich material given in this book will be as good (and useful to students) as are the teachers who use it as the starting point of the instruction. And here is my only disagreement with the way Gordley has chosen to present his formidable learning. For he has given his students and his colleagues an instrument—this book—which they will only appreciate if they can be shown how to supplement with further cases, scholarly references, empirical evidence and the like the material he has made available to them. Why generalize? Let us instead give two or three concrete examples to show that the material in this book needs careful and knowledgeable adding to before it can have its full and desired effect. Is Gordley, overestimating the capacity of most (clearly not all) of his colleagues to provide it?

A. Models of Civil Procedure

Let us thus begin with the extracts from John Langbein's article on German civil procedure and what it has to offer to Americans. The

16. *Understanding American Law by Looking at It Through Foreign Eyes: Towards a Wider Theory for the Study and Use of Foreign Law*, 81 TUL. L. REV. 123-85 (2006).

proposal sparked off a heated and at times harshly phrased debate,[17] which (it may be safe to say) failed to budge the adherents of the two views from their respective positions. More recently, however, Professor Chase[18] returned to the fray and, through extensive references to sociological literature,[19] attempted to suggest that cultural reasons made the transplantation of the German model to the United States impossible. His views lead us to reflect once again on the invocation of culture as an inhibitor of foreign borrowing.

Professor Chase's sources confirm (or are meant to confirm—personally I adopt an ambivalent position on the evaluation of the sociological evidence since I confess a certain mistrust towards the methods adopted and the meaningfulness of the conclusions for legal rules) the well-know stereotypes of German "authoritarianism" and American "individualism." These characteristics, he argues, tend to make the Germans value "certainty" more than the Americans. It also leads them to wish to promote settlements at every conceivable opportunity. Leaving aside the fact that I feel that certainty, predictability, and reduction of litigation are, in principle, desirable characteristics of any legal order,[20] the picture painted by Professor Chase of the German and American legal systems is not one which can be recognised with ease. Here are three reasons why I say this, though again they are mentioned only briefly because of lack of space.

First, it is the Anglo-American systems that have developed and used their legal devices (for instance the duty of care in their law of torts) or arguments such as that of floodgates *against* litigation, or phrases such as "bright line rules" in order to ensure certainty (and rigidity) at the

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17. Thus see Ronald J. Allen, Stephan Kock, Kurt Reichenberg & D. Toby Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 ff (1988), to which Professor Langbein replied, *The German Advantage*, 82 NW. U. L. REV. 763 ff (1988). Allen's riposte, entitled *Idealization and Caricature in Comparative Scholarship*, appeared in 82 NW. U. L. REV. 785 ff (1988). Others joined the fray. Thus, see John H. Merryman, *How Others Do It: The French and German Judiciaries*, 61 SO. CAL. L. REV. 1865 ff (1988), and John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 ff (1990). The articles mentioned in the next note show that the discussion is not abating but is now acquiring a new, sociological dimension.

18. *Legal Process and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1 ff (1997). For Professor Langbein's (somewhat intemperately phrased) reply, see *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT'L & COMP. L. 41 ff (1997).

19. The works most used were GEERT HOFSTEDE'S CULTURE AND ORGANISATIONS. SOFTWARE OF THE MIND (1991), now available in a revised edition (1997), and his more substantive CULTURE'S CONSEQUENCES (now in its 2d ed. 2001).

20. Though one can always find authors arguing the opposite; see, for instance, Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 ff (1987).

expense of flexibility and justice. While judges using the expression "bright line rules" have in fact stressed that what is uppermost in their minds is administrative convenience and not justice, courts that have condemned this reasoning have exposed the true reasons behind them. These are not arguments or devices found in any civil law system.

Secondly, Professor Chase's article is based on a central theme which supports his contention that "(T)he German system . . . reflects a willingness to accept structures of authority that are inimical to the more individualistic Americans."[21] If that is the case, one may be permitted to ask: are the Greeks or Italians, who essentially share the same model of civil procedure as the Germans, also "authoritarian" and any less "individualistic" than the Americans? Since the answer must be negative, one is led to believe that there are other more important factors which make this transplantation of ideas and institutions possible.

Finally, if civil procedure rules "must be placed in deep cultural context,"[22] how does one explain the recent Woolf Reforms in England, which are based on a lengthy and comparative law exercise and led to the adoption of many rules and institutions that strengthen the managerial role of judges, accept the idea of court-appointed experts, and the like (all of which are features which Professor Chase does not treat as "American")? Does this mean that the English are more like the Germans than the Americans? Or does it support Professor Chase's thesis that rules cannot be borrowed (not even ideas can be looked at) if some sociological model adopts a different way of classifying nations?

The problem with such an unadulterated sociological approach to law is not just that it does not sit well with what lawyers say and do; it also hides the real reason why such transplants are difficult. Professor Chase, himself, mentions it at the end of his article, though hardly gives it the prominence I think it deserves. In his words, "(E)ven if American judges would try to expand their control of the trial we can predict a long and costly struggle with the trial bar . . . ."[23] This may well be a valid prediction. I suspect that Professor Langbein would not deny such difficulties. But it is a pragmatic, not cultural (except in the loosest possible sense of the word) objection; and the acceptance of the changes made in England by the Woolf reforms suggests as much.

To sum up: First, the question of cultural differences *is* important, as is the need to adapt a foreign idea when introducing it in a different environment. But I entirely agree with Professor Langbein when he

21. *Supra* note 18, at 1.
22. *Id.* at 6.
23. *Id.* at 8.

wrote "(I)t is all too easy to allow the cry of "cultural differences" to become the universal apologetic based upon comparative example."[24] Moreover, the gradation approach we proposed shows that it does not work as an inhibitor. Secondly, legal practice proves that the "cultural differences" card, though both important and delicate, can be overplayed. The impact of the Canadian Charter on the development of Israeli human rights law must, surely, attest to this. The *El Al Airlines Ltd. v. Danilowitz* decision[25] of a three-judge panel of the Israeli Supreme Court proves as much in one of the most sensitive of areas on which local religious feelings have clear-cut views (homosexual rights), Justice Dorner indulging in an even more extensive use of comparative (mainly Canadian) material than Justice Barak (who in fact nearly lost his scheduled promotion to the post of President of the Court).[26]

Langbein's piece is thus both learned and thought provoking; but despite the many references it contains, the student will not understand the German position, the differences with the Anglo-Saxon models—and the plural is now important since the English legal procedure has in recent times moved closer in many respects to European models—and the reason why indigenous factors may prevent or retard the adoption of foreign ideas. What these factors are the teacher and the student must together consider, examine, test. Wider sociological factors may have to be taken into account; but the few paragraphs I added concerning Professor Chase's attempt to switch the debate to a different discipline and invoke somewhat stereotypical descriptions of foreign nations as a reason for closing one's eyes to their laws must be treated with caution. For though they may contain interesting ideas, they will rarely help the lawyer understand a problem which is not only closely linked legal ideas and notions but also if not mainly local practices of the legal profession.

Gordley, by citing extensively from the Langbein article, gives his readers a good starting point; but they will have to be guided further on what else to read and what else to consider before they can appreciate the true value of the material they have been asked to read.

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24. 52 U. CHI. L. REV. 823, 855 (1985).

25. (1994) 48(5) P.D. 749.

26. *See An Equal-Rights Decision That Flies in the Face of Some Beliefs*, JERUSALEM POST, Dec. 12, 1994, at 7, and the 1 December 1994 issue of the same publication at 2. For a further discussion of the use of foreign law by Israel's Supreme Court, see Segal, *The Israeli Constitutional Revolution: The Canadian Impact in the Midst of a Formative Period*, *in* FORUM CONSTITUTIONNEL 8:3 (1997), and Dodek, *The Charter in the Holy Land?*, FORUM CONSTITUTIONNEL 8:1 (1996).

B. Comparing Approaches in the Law of Nuisance

Let us now move to another example Professor Gordley discusses in his book; this time coming from the law of nuisance. The points he discusses are two: what is the appropriate remedy when an actionable nuisance is committed and, secondly is coming to the nuisance an acceptable defence. Though these points are discussed into separate sections—pages172 ff and 181 ff—they are both part and parcel of the discussion found in the leading English case of *Miller v. Jackson*. Then they are also compared to some French and German originals and even traced back to Roman law. I do not forget my earlier observation that it is for the author of each book to decide what he wishes to stress or illustrate. But there may be other relative, arguably more important, points that should be raised in conjunction with the text of the case reproduced. If the collection of materials provided is not accompanied by notes highlighting these points, drawing the attention of the reader to the words of the judgment which raise them, and alerting him to other structural differences between the systems, how will he even become aware of them, let alone be in a position to decide what is really at stake in a particular legal dispute? That is why we come back to the need of a well and broadly educated teacher holding the hand of the novice as he turns the pages of this tome. Let me amplify the points which crossed my mind as I was reading Professor Gordley's text.

I start with literary style: the way Lord Denning opens his judgment is a *locus classicus* of his elegant, short and most effective sentences. Stylistically they are of the kind which one would find in a Cardozo opinion; and I chose to mention Cardozo, not only because I am a fan of his written style, but also because he is known for formulating the facts of a case in a way which would help him reach the conclusion he wants.[27] Now Denning's first twenty lines or so are not only the literary equivalent of a Poussin or Claude Lorraine painting, or the musical equivalent of Beethoven's Pastoral symphony, as they take the reader through light and shade, pastoral calmness to nature revealing its full fury, in a most dramatic way; they are more. For behind the beauty and the confrontation of conflicting emotions, lies a subtle and sustained attempt to lead the reader to decide that it is not really *reasonable* to sacrifice the interests of an entire village community for the benefit of one house owner who "is no lover of cricket(?)". Even the majority refer

27. Karl Llewellyn showed this in *A Lecture on Appellate Advocacy*, 29 UNIV. CHI. L. REV. 627 esp. 637 (1962), commenting on Cardozo's famous judgments: Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1913).

to the all important test of reasonableness but they, too, fail to alert the student, indeed any commentator of the judgment, that reasonableness in Nuisance is different from reasonableness in Negligence. For in the former, we look at the plaintiff and the effect which the activity is having on his use and enjoyment of his land whereas in the latter we look at the defendant's conduct and decide whether it falls below the standard of the reasonable man.

Now, in English law the answer is that if the activity complained of affects materially the plaintiff's property the tort is complete and the court then has to decide what is the appropriate remedy. To this question the answer can be either an injunction or damages. But then we come to another peculiarity of English law. For though injunctions are discretionary remedies, in nuisance cases which involve material interference with the property and not just interference with its use and enjoyment, the courts tend to grant injunctions as of course. The result is that the English court, unlike the New York Court of Appeals in *Boomer Cement*, would thus be near-obliged to grant an injunction if it found that an actionable nuisance had been committed. The arguably more equitable result of the American decision would thus be difficult to achieve in English law, hence Lord Denning's wish to lead his readers from the very outset of his beautifully crafted opinion to the conclusion that there was no nuisance in this case.

Making the novice student see two factually (almost) parallel cases—*Miller* and *Boomer*—in this way not only makes him reflect on what (usually little he has done about nuisance in his course since it tends to fall between torts and property), makes him realise that reasonableness is a term found in two torts but has a different meaning, and finally makes him question whether the result reached in *Boomer* is really that fair. For as the dissent in the Court of Appeals pointed out, ordering the payment of damages could, depending on how they are determined, be tantamount to expropriation of property but without having observed the constitutional guarantees of the Fourth Amendment. Besides, the *Boomer* judgment talks about compensating the plaintiff's economic losses. And what about his loss of amenity: the fact that he is now living in a house which is daily covered by cement dust? And what about the fact the value of the land, should he wish to sell it, is seriously affected if not destroyed. This is where the Socratic-case-oriented method can be so rich; this is where detailed information from other systems (and how they deal with these issues) is more worth-while than citations to Roman law texts; this is how we can make the study of foreign law useful other than

to show him that the same kind of factual configurations have been litigated in other countries as well. The answer is of course, they have.

And talking, finally, of foreign systems, a French case is given to show that the problem exists there, too. But not a word about the fact that the French see Nuisance as an "abuse of the right" to use one's property, whereas we see it as wrong i.e., a tort. What a marvellous and yet missed opportunity to cite here the late Harry Lawson[28] and how medieval lawyers moved the remedy—*actio quasi negatoria*—which protected these kind of interests—into the law of property, laying emphasis on the ideas of abstraction, and systematisation which, eventually, would lead them to draft their modern Codes, whereas our ancestors saw law as being concerned with wrongs and remedies and not in the definition of abstract and absolute rights. Thus, not having ever conceived rights in an absolute and abstract manner we never had to develop as the French did in the 19th and 20th century theories such as that of abuse of rights.

The above example does not imply that Professor Gordley has misled his readers; it merely suggests that his extracts raise more points than he has touched upon. The presence of wider ranging and more extensive notes could go a long way towards curing this problem.

My third and last example, however, does suggest that one judgment from a highly complex case has been presented as if it shows the un-equivalent attitude of English law. Arguably, the position is much more complex than the extract suggests; and the room for learning from foreign law considerable in the kind of issue at hand. How will the reader of these texts guess this unless, once again, his mentor is fully immersed in the details of at least three major legal systems. With many Americans teaching comparative law treating it as a second or third string in their bow, how many of them will be able to rise to the occasion in a book which gives texts but no further leads as to how to use them?

C. *Tortious Liability for Breach of Statutory Duties*

The case that leads me to make these comments is *Stovin v. Wise*[29] and one page only is extracted from a judgment which contains a powerful dissent by Lord Nicholls of Birkenhead. At its simplest this was a case involving a car accident which happened at the intersection of two roads where visibility was seriously impeded because of overhanging branches and protruding foliage which the local council has the power to

28. A COMMON LAWYER LOOKS AT THE CIVIL LAW (Michigan 1953, reprint 1977).
29. [1996] 3 WLR 388.

trim but had chosen to exercise its discretion not to. The injured driver sued them both in Negligence and for breach of statutory duty. The case is extracted as authority for the proposition that the law punishes defendants for being bad, not for not being good. The question of liability for omissions is more complex than the whole set of extracts reproduced in this part of the book suggests. The reason is not only because pure omissions can often be seen as bad acts, the law is further complicated by exceptions when we come to neighbouring landowners. In the USA things get further complicated by various statutes imposing generally or to some kind of people obligations to come to the aid of others. These, however, are obstacles which most teachers and good students who have studied American torts will recognise. The difficulties come when we switch out attention to the possible liability of the local authority for breach of their statutory duties, which is highly abridged in Professor Gordley's book at the bottom of page 365.

In English law the problem has been highly controversial for at least the last twelve to fifteen years or so. Leading judges have divided in three ways. The most progressive have taken the view that the problem should be handled at the level of breach and no pre-emptive rule against liability should be adopted through the utilisation of the notion of duty of care. Lord Bingham, the Senior Law Lord has thus been arguing since 1994 that "If [claimant] can make good her complaints (a vital condition, which I forebear constantly to repeat), it would require very potent considerations of public policy, which do not in my view exist here, to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied".[30] Others, like Lord Hoffmann, said in the case cited by Professor Gordley that "The trend of authorities has been to discourage the assumptions that anyone who suffers loss is prima facie entitled to compensation from a person (. . .) whose act or omission can be said to have caused it. The default position is that he is not."[31] A third group of judges, represented by Lord Nicholls

30. In *M. v. Newham London Borough Council* and *X v. Bedfordshire County Council*, [1994] 2 WLR 55, 532.

31. *Stovin v. Wise*, [1996] 3 WLR 388, 411, per Lord Hoffmann, one of the most conservatively minded judges, has consistently adhered to his firmly phrased principle in such cases and has taken an equally restrictive position in other fields of law, for instance in restricting minority shareholder remedies (*see* Re Saul D Harrisson & Sons plc, [1995] 1 BCLC 14; O'Neill v. Phillips, [1999] 1 WLR 1092, which have been met with legislative approval), as well as restricting tort remedies for breach of EU competition law (e.g., Inntrepreneur Pub Co. (CPC) & Others v. Crehan, [2006] UKHL 38). Likewise, he has refused to grant any new remedies in a privacy related case such as *Wainwright v. Home Office*, [2003] UKHL 53, 16 Oct. 2003, displaying a remarkable consistency towards civil law remedies. The latter judgment was recently

who, as we said, dissented, in the case extracted in Professor Gordley's book, has sat on the fence, sometimes leaning in favour liability[32] while on others, concurring with Lord Hoffmann.

The constant theme of these observations not just to Professor Gordley's book but the case book method of presenting the law through extracted parts of complex cases is that they can give a partial if not wrong opinion of the law to the un-initiated students, especially if their teacher cannot help make up for the omissions and gaps in the inevitably truncated account of the case book. Here, the gaps are even more glaring given that we are looking at a problem found in all advanced countries but differently resolved by their legal systems. Two points are particularly fascinating if one looks at this issue in a comparative manner.

First is the fact that the English judgments, even more so than their American counterparts, have been explicit on the policy issues that incline them against liability. Among them we thus see: (a) the danger of interfering with administrative discretion; (b) the danger of making administrators afraid to act; (c) the danger of courts assuming power which should be exercised by politically elected officials; (d) the danger of bypassing a multitude of other, equally efficient remedies, in favour of remedies which will enhance acrimony and increase litigation; and (e) will produce highly adverse if not economically insupportable economic consequences for the state or other local entities which will have to foot these bills. This open allusion to policy is a fascinating and frank way of showing the student how to go behind the concepts used by the courts and show him that these are really the verbal devices used by the courts to formulate judgments but the reasons which really led them to decide a case in a particular manner. Yet this point is really more that a restatement of what the Realist movement has been arguing for over eighty years in the USA; it is a magnificent way of showing a comparative novice how important it is for him not to get too "hung up" by the legal concepts he is taught at his Law School but to learn to compare legal systems functionally rather than conceptually, i.e., by going behind their respective concepts and trying to understand what these systems are really trying to achieve. Many years ago, some European colleagues and I attempted a comparative examination of these

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overruled by the European Court on Human Rights in *Wainwright v. United Kingdom*, Application no. 12350/04 of 26 Sept. 2006.

32. E.g., *Stovin v. Wise* [1996] AC 923, and, most importantly, and speaking for the majority in *Phelps v. Hillingdon CC*, [2001] 2 AC 619, 667, where he said: "'Never' is an unattractive absolute in this context" (referring to the notion of duty of care).

cases[33] and were interested to discover that these policy issues had all been considered in some form or another by the German and French systems and rejected as un-convincing. Given that these are systems of countries with similar socio-economic backgrounds as that of England, it made one wonder why what was seen as a super obstacle by one set of lawyers was a nonproblem by another.

This led me and my successor at the Chair of comparative law at University College London to explore a completely different possibility namely that the real reason why English lawyers were reluctant to impose liability was a purely economic one. Our long and empirical survey,[34] making extensive use of little known German material, has shown—we venture to suggest conclusively until equally detailed evidence to the contrary is adduced—that the restrained measure of damages in Germany meant (a) that the dire economic consequences predicted never materialised and (b) the parties have evolved in practice a system of settling disputes out of court and the feared litigiousness also did not materialise. The interested reader must consult this long article himself for further illumination; here, however, I am content to raise it as my last illustration of the need to provide readers of such books with additional notes, comments and references if they are to understand properly the rich raw material so copiously and admirably selected but given to them without adequate exegesis. And there is a further reason why I lay so much emphasis in using this kind of material for the purposes of teaching foreign law and developing an efficient methodology for comparing systems.

Quite simply it is this. Looking at the Anglo-American immunities, achieved through the extensive and often vacuous use of the notion of duty of care, and compared to the liability rules of French, German or Italian law, one realises that the problem does not lie in the rules and notions of tort law proper, i.e., the notions of duty, carelessness, causation and the like but in the law of damages and the heights they can attain (but need not attain) in the Common law systems, especially those which, like the USA, still make use of juries. The magnitude of American awards in these type of cases is well known.[35] Yet the figures have not, to my

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33. B.S. MARKESINIS, J.B. AUBY, D. COESTER-WALTJEN AND S.F. DEAKIN, TORTIOUS LIABILITY OF STATUTORY BODIES. A COMPARATIVE AND ECONOMIC ANALYSIS OF FIVE ENGLISH CASES (1999).

34. *Authority or Reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective*, [2007] EBLR 5-75.

35. The *Los Angeles Times* of 17 March estimated that the ramifications of the "Rampart scandal" would cost the County government at least $6 million. The county's annual budget is $15 billion. During the years 1989-1999, the L.A. tax-payers paid an estimated $106 million to

knowledge, been carefully shifted and discussed. Certainly, nothing comparable to the kind of study which Professor Fedtke and I tried to do has been attempted in American law. Of course, one could argue that X million of dollars is X millions too many; and that such sums would be better spent on more schools, hospital beds, better equipment or, at any rate, the provision of the kind of services that elected officials—not judges and juries—believe should be made available.[36] There is force in such reasoning and nothing is gained by denying it. However, it totally ignores the fact that in many—not all—of these cases innocent victims have suffered serious harm as a result of undoubted negligence and, at times, intentional activities on the part of public officials. The "Rampart scandal",[37]which plagued the Los Angeles County for years could be seen, had it ever been fully substantiated, monumentally embarrassing as it suggested a very wide corruption in the local police department. In such and other similar cases, should the harm suffered by ordinary citizens always be subordinated to the book-keeping argument of local authority budgetary surpluses come what may? Or is it right to argue that the imposition of liability will make officials reluctant to act? Or, on the contrary, is a measured degree of responsibility likely to contribute to the maintenance of high standards of public service? One is inclined to agree with Lord Bingham[38] that it would be too rash to ignore any deterrent value to a liability rule; and one is thus pleased to note that this argument most recently found favour with a least one judge in the *Phelps* case.[39] In this context, one must also add as a postscript that most if not all of the mega-awards are found in the most egregious forms of police

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settle abuse and lawful arrest cases. The infamous Rodney King incident cost it $3.8 million of which 1.4 per cent went to legal fees and costs. *See* Elias, THE RECORDER, Oct. 11, 1999.

36. The *Los Angeles Times* article referred to in the previous note estimated that the $6 million costs would cover the expense of 180 extra beds in the county's six public hospitals.

37. The Rampart police station, situated some 40 blocks west of the downtown area of Los Angeles covers a mostly Latino community. According to the confessions of one of the police officers arrested in the process of trying to steal cannabis in the possession of the police, local policemen engaged regularly in routine beatings and unjustified shootings of suspects and the falsification of evidence which led to many wrongful convictions. No outside observer can comment meaningfully on such accusations. What can, however, be noted is that some 100 convictions have thus far been overturned as a result of the Rampart scandal; and numerous claims are currently pending against the Los Angeles Police Department. L.A. TIMES, Aug. 29, 2000. The Federal Department of Justice has recently been given supervisory authority over the Los Angeles Police Department. L.A. TIMES, Sept. 20, 2000, at A1. The enormity of American damages must be weighed against the enormity of the alleged criminal activities carried out (by a fraction) of the law enforcement agencies.

38. X v. Bedfordshire, [1994] 2 WLR 554, 662G.

39. Phelps v. Hillingdon LBC, [2000] 3 WLR 776, 809 (per Lord Clyde).

abuse and not in the context of negligent misdiagnosis of learning diseases or failures to make country roads safe to use.[40]

These ruminations, stemming from one page of Professor Gordley's book, show how the full richness of the material he has assembled can only become apparent if those who teach it come close to his learning and can use their own knowledge and expertise to make their students appreciate how much they can learn by looking at another system. This kind of thinking thus leads us naturally to the last sub-heading of this review. How should one teach comparative law to students, typically American law students, who are, by definition, more advanced in their studies and more professionally oriented than their European counterparts but who, like all novices, are almost totally ignorant of what happens elsewhere.

V. FIVE DIFFERENT WAYS OF TEACHING COMPARATIVE LAW

This has been a review of a case book with elements of a text book, rolled into one. As repeatedly stated, it is written by an undoubted scholar and even glancing at it leaves one in no doubt as to the amount of learning and work that has gone into it. Yet we have also suggested that as a teaching tool it raises a number of concerns the most important of which, in my view, are linked to the breadth of knowledge expected from those who use it as a teaching instrument. For without it being supplemented by notes and questions by expert, i.e., widely read teachers, the true richness of the material will elude most of the readers of this book. Its success or failure will thus largely depend on how those who use it as a teaching tool will compose their cadenzas.

This is a conclusion I have reached about other case books as well; but in the area of comparative law it has made me agonize a great deal since the average student reading about foreign law comes to this vast topic with a very minimal preparation. How one should teach foreign law and how to attempt the comparison of systems is thus, in my view, a topic which, has not been adequately addressed by American comparatists. The answer to this key question is closely linked to another question, equally un-answered and equally un-discussed: who are we primarily trying to interest and instruct: the student? The practitioner? The judge? Or all three (though in different ways and for different

40. The plaintiff in *Phelps* received approximately £40,000 (around $60,000). The figures claimed that we have seen in the misdiagnoses cases range around the half a million dollar mark; but in none have the causation and quantum tests enunciated in this paper seem to have been applied. In the absence of contrary evidence, we thus remain of the view that the absolute fears about damages remain to be substantiated.

reasons)? This learned tome provides one type of book which, is primarily aimed at a student audience. What other alternatives do we have for this audience? And what if we wish to reach and influence also the other audiences mentioned a few lines above?

Teaching comparative law through a collection of essays seems another—the second—alternative. I shall soon explain why I am not convinced that this is the better and certainly not the best method. Still, it is beyond doubt that it is fashionable these days to produce large (or very large) tomes which encompass within their covers collections of essays written about different systems or different aspects of the wider questions of comparative law: how does one understand a foreign system? Why different societies tend to produce systems that cannot converge? How can deconstructionalism enter the study of comparative law? What is the role of sociology in such exercises? These essays, though written by different authors, may be linked by the desire to assemble around the editors like-minded writers, anxious to promote (more or less) the same kind of theme or approach to the study of foreign law. Paradoxically, this theme can sometimes be that it is not even worth trying to bring the systems closer together because their societies make such convergence impossible.

A variant of the above is to adopt a wider approach and divide the voluminous collection of assembled essays under headings dealing with countries—e.g., comparative law in France, Germany, England etc.—purposes, aims, techniques and the like. These books do believe in convergence, harmonization or, at the very least, enhanced understanding; it's just that they also believe that in entrusting this task to twenty or thirty authors to do each in his own way is as good if not better than asking one to do in a book such as here reviewed. The recently published *Oxford Handbook of Comparative Law*, edited by Professors Reinhard Zimmermann and Mathias Reimann is, probably, the best example of this genre of collection of essays. Its aim is clearly to be as inclusive as possible of ideologies and approaches and this, partly in order to satisfy one's own scholarly desire to be as complete as one can afford to be and, partly, in order to give teachers using the book enough material for each to use which ever part of it best suits his own interests. This last aim may not assist the internal cohesion of the book; but it can satisfy the publisher's desire to try and reach as large a market as possible.

Both types of collections of essays suffer from the insurmountable problem that affects all books the contents of which come from different pens: the various parts are unequal in quality, some purely descriptive, others more thought-provoking, yet others being rehashed versions of

papers given elsewhere while yet others being essays which fly academic kites rather than attempt a definitive presentation of its author's view. Above all, however, such assembled pieces, unless subjected to severe editorial intervention, are rarely ideologically consistent with each other and even more rarely do they have *a message* to convey, let alone one shared by all the authors. These ideological or political differences may not always be discernable to students but they are to the more expert eye. As if these drawbacks—I would go as far as calling them defects—were not enough, such works suffer from another serious flaw: large though they are, the component pieces are rarely specific enough, focused enough, and detailed enough to be of any real use to practitioners, judges, or law makers. One could easily be specific and point to individual contributions in the Zimmermann/Reimann magnum opus to prove the point that the material so accepted for publication consists largely of a summary of widely known facts about, say, the story of comparative law in France. For someone who knows nothing about this topic, they may be of some interest; for someone who needs reliable, specific, information about a foreign system, this material is close to being of no use. Those who are interested in cytology studies will recognize immediately the fact that the kind of works that are noted, cited, and used as inspiration are the works that are detailed, precise and useful and not general, chatty and descriptive and many of the essays in these books do not fall into this category. To say all this in this day and age which dislikes meritocratic distinctions and believes in (unearned) equality of result may be un-popular; but I think my view contains a part at least of the truth so it may be worth putting in writing for others to consider and, if need be, reject *in a reasoned and specific manner*.

For all these reasons I personally prefer the kind of book I have here tried to review. To be sure, I would like it with more extensive annotations, to lead its user to go further than the material provided. But, failing that, it might be best to combine this kind of case book with the textbooks—the third kind of teaching tool considered here—which are available on the market. These are as replete with detail as their size permits and do not suffer from the disadvantages which I, at least, associate with collection of essays (though this does not mean that I discard the value of individual pieces found in them). It is just that I value more the information the good text books can provide, especially when this is given in a detailed manner, backed by references to named cases, and written in a readable style, devoid of some of the ugly neologisms with the critical legal studies movement has tried to introduce into comparative law. Zweigert and Kötz's *An Introduction to*

Comparative Law is the model for this category, beautifully written in German, even more beautifully translated into English by Tony Weir. Provided these books are properly and even radically up-dated,—and I return to my warning about the difficulties of proper updating and not "lazy" updating through footnotes—there is every reason to believe that they will go on appealing to many lawyers, beginners as well as the more advanced variety.

And yet this type of book, as well, suffers from a drawback which, I think, stems from the needs of the age when they were invented. The drawback is that though these type of books start from a given ideological or methodological premise—in the case of Zweigert and Kötz, Ernest Rabel's famous functionality method—they still fail to present the information they have assembled structured around *a series* of ideas and beliefs which ascribe to the study of foreign law a clear, definable, and practically useful purpose and adopt for its accomplishment a suitable methodology that makes it easier for the reader to move back and forth from one system to another. To these requirements, I must add one more for it is this which makes this moving from one system to another easier and meaningful. It is the ability, acquired with years of reading and experience, to place the study of detailed rules against *those parts of the system's backdrop which are immediately relevant for its understanding* but without advocating the full mastery of all the complex elements of the foreign society which, by definition and given their amplitude, lead to the conclusion that comparison is impossible. This setting of the rules against their wider (but relevant[41]) setting is thus, in the textbooks of the Zweigert and Kötz variety less than complete than one would like. Indeed, beyond mentioning history, the other societal factors that affect the development and operation of the law seem to be excessively downplayed.

The approach I thus prefer would lead to a fifth category of book: the provocative monograph/textbook. Such an approach has, it must be admitted straight away, its own "political" agenda; but then no comparatist who left his mark on the subject has ever advocated an approach that did not have a "political agenda" at its base. This is as true of Montesquieu in the 18th century as it is of the critical legal studies movement in our times. To pretend otherwise is an exercise in illusion or self-delusion. What, then, is the agenda I would wish to promote?

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41. Professor Garapon, for instance, is a French jurist who has argued that one cannot understand French law and legal thinking unless one knows well French cinema. *See* Antoine Garapon, *French Legal Culture and the Shock of "Globalisation,"* 4 SOCIAL & LEGAL STUD. 493 (1995).

Quite simply, for me the prime aim of teaching foreign law is the exchange of ideas in a shrinking world which is getting closer and closer together through economic, political, scientific, and environmental concerns which are shared by nations, at any rate of approximately the same level of socio-economic development. If I can get the exchange of ideas going and lawyers from different systems understanding each other better, I shall be content to leave it to them to decide how best to use the so acquired enhanced knowledge and improved understanding of each other. Such an approach, through the medium of what I call the monograph/textbook, has not really yet been adopted by any text book or treatise. Why? The reasons are many and here are some.

First the format of textbook/monograph has never been attempted because a text book is seen primarily as descriptive and didactic and the monograph is conceived as an instrument of intellectual provocation and inspiration. The combination of the *genres* has simply not been envisaged. But should it not?

Secondly, it takes courage to strike out on a new path and present the study of foreign law in a way which is openly based on a series of inter-connected ideas, some new, all untested empirically. My central one is that that the subject must be made to be (and appear to be) relevant to practice and not just culturally enriching (attractive aim but, in itself, inadequate) or trendy (attention-catching aim but, on present evidence, intellectually second rate). Saying this alienates a section of the academic community and delays the moment of innovation but it has to be admitted.

Thirdly, what I advocate is not easy to follow and that is because the volume of work needed to carry such detailed research and then link it to the demands of practice far exceeds the amount of time needed to write one short contribution in someone else collections of essays. Not surprisingly therefore most colleagues who are (or call themselves) comparatists (but are really conflict lawyers or private lawyers with a passing interest in foreign law) opt for the second and easier option. It is a sad but not, I believe, an erroneous assessment to make namely, that our era if one which favours quick returns with a minimum of effort; and the large number of the pieces I just alluded to suggest, to me at least, that that is precisely what has happened in practice.

Finally, there is also the question of getting things wrong. This risk is bigger if you are writing a monograph which is also meant to serve as a thought-provoking and not only informing text book. But then anyone who tries to innovate in life must be prepared to run risks. Again we see that the opposite is true of textbooks or casebooks since it difficult for

them to go wrong; invariably, the worst one can say about them is that they are either incomplete or bland. Indeed, one might continue being provocative by suggesting that one reason why they are used is because they are reliable; and by striving to be reliable they often "play it safe" ending up by also being dull! That, of course, applies to textbooks across the board and is not limited to comparative law.

The untried hybrid of textbook/ monograph genre undoubtedly will face its difficulties and run risks. But an author, when he aspires to be a teacher rather than a treatise writer, should be willing to put forward new ideas, try to promote law through innovation rather than repetition and, to achieve these aims, accept from the outset the concomitant possibility of being wrong. This is a risk worth taking; and I plan to take it in a book to be published in 2008 entitled (provisionally) *Engaging with Foreign Law* which I am writing with my colleague Professor Jörg Fedtke because he and I believe that a book which presents the *details* of a foreign legal system or systems around a series of carefully selected themes would be that much more attractive as an instrument of teaching if, in addition, it was thought-provoking by virtue of the fact that it told its readers: "this is *how* this author thinks our subject should be taught; this is what he thinks *it's all about*; this is what he thinks *one could make of it*. If you disagree, here are further references to consult and issues to contemplate. And, after you have done all this *and had time to reflect*, then criticize the authors' stance. Better still tell the world how your approach can ensure for comparative law a higher profile in the classroom and the courtroom."

This is the kind of work I plan to write. Professor Gordley has stuck to a better-tried model. He must be judged by reference to the accepted standards of this genre; and by these standards, he has done, as one would expect from a scholar of his learning, extremely well.