FOREWORD

*Keith Nunes**

American jurists (practitioners, judges, government attorneys, scholars, faculty, house lawyers, and students of the law alike) are intensely interested in the French legal order. It is an interest which transcends codification—that product of the formidable intellectual advance of the eighteenth century process of the Enlightenment—and even the rational significance and historical fertility of the *Code civil*, whose extraordinary influence spread throughout the world as a legal transplant. What excites the American legal mind—honed on the stimulating march of the jurisprudence of constructive legal realism—is, rather, the original degree of close consonance between the social process of the French community and the *Code civil*, and the way in which the Code's aging has been modulated and adapted to reflect societal developments in France.

At the Code's inception, the legislative prerogative expressed therein seemed omnipotent. The Code was thought to be a product of precision. It soon became apparent, however, that, in practice, judicial decision could simply not be ignored. Scholars, having an observational standpoint and serving a social reality of human dignity, led the way—away from the mere exegesis of a closed and internally consistent syntactical system of static, black-letter positive rules, namely, formal abstractions external to the community. The sun began to set on the logical self-consistency and systematic plenitude of statute law and the intention of the legislature as expounded by the exegetical school. Spurred on by Domat, Geny, Saleilles, Josserand, and Duguit, who had scant regard for legal symmetry and sterile hermeneutics, ideas of legal writers increasingly acted as the catalyst to bridge the nineteenth and twentieth centuries.

These French scholars fashioned doctrines for policy serving decisions in order to make the law responsive to social change and thereby to give effect to a prescriptive principle that furthers the predictable resolution of controversies. It is to this genre of the world's great jurists that Professors Henri Batiffol, André

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Tunc, and Louis Vogel of the historically influential University of Paris belong. They seek to explicate the more determined human rights of the *Code civil* by doctrine that is authenticated not as an autonomous system of absolute and highly abstract rules, spontaneously and automatically affirmed in a human society at large, but by its viability in fact and its authority in social reality. Heed is paid to the essential requirements of community life, but this basic quest for the purpose of law is not quixotic; it is tempered by combining the research results of social science, comparative law, international law, and the actual usage and practices of individuals in their interpersonal transactions. The *Code civil* has been adjusted to contemporary social life in France both by the legislator, who has altered its text, and by the courts, who have either limited or extended its prescriptions. The beneficial motor behind the development of the decisional law, however, continues to be the multifaceted academic excellence of the scholars. Even though the *Cour de Cassation* and the *Conseil d'Etat* assiduously avoid revealing the influence of academic writing, the professor of law in Romano-Germanic countries has the greatest prestige in affecting both the outcome of concrete disputes and long-range developments in the law.

As a matter of intense practical relevance to the lives of people and their treasures, Professor Henri Batiffol surveys the legal situation in order to maximize choice of jurisdiction (adjudicative competence) and choice of law (prescriptive competence). The contemporary world, as we know it, is composed of an unusually complex multiunit social system. The global public order system is relatively decentralized in predominantly territorial communities of power. International law is more discrete than municipal law, with weak mechanisms for resolving intergovernmental legal disputes and even less for moderating interpersonal legal controversies. Professor Batiffol readily affirms the view of his equally eminent international law colleagues, Professors Georges Scelle of France and Myres McDougal of the United States. All agree that at the international level, state officials (including judicial officers) functionally serve as dual decisionmakers, both for the international community and for their nation-state—*le dedoublement fonctionnel*. Professor Batiffol's interest as a private international lawyer has been to order interpersonal relationships in a fair and reasonable way by adjusting conflicts between local and foreign fora as well as between local and foreign law. To accommodate the rich national and cultural perspectives and expectations, he

indicates that it is better for states to have considerable discretion at the unit level; facilitating choice in a world that is so diverse. He is sensitive to the highly decentralized social reactions that are unilateral in form and remedial in purpose (retorsion, reciprocity, reprisals, suspension, and termination of treaties). Such reactions seek to order a society and an economy that pays less attention to state and national lines and more attention to larger interests of human rights and the security of human transactions, as well as human affairs affecting personal status.

For Professor Batiffol, national courts cannot maintain interstate and international order and redress harms unjustifiably inflicted if the Occidental world is irrevocably separated from other legal cultures by *cordons sanitaires*. Walls along state or national boundaries, rather than invisible frontiers, are survivors of the thirteenth and fourteenth centuries, with their medieval moats and walls of rigid, systematic internal and external fortifications. Adjudicative and prescriptive jurisdiction should not be barriers delimiting mutually antagonistic civilizations and separating citizens and foreigners, but should instead be responsive to open and fluid political and social frontiers. Professor Batiffol's dominant idea is to develop a rational and just approach for authoritative decision makers to co-ordinate national legal systems in order to accommodate foreign elements in the conduct of the ordinary affairs of men, women, and children. The intellectual task in the conflict of laws is to regulate a fair and reasonable system of secondary competence to make law (prescriptive competence) and to apply law (applicative competence) among the global communities. Such an allocation of legal competence among the national units will be responsive to the intense demands or claims of each unit and thereby enhance and reinforce each other.

Although addressed to civil actions in a transnational setting, the approach of system co-ordination is equally valid when transferred to the American context, with fifty state court systems and a separate system of Federal courts having concurrent jurisdiction in diversity cases. In the multistate arenas of the United States, adjudicative jurisdiction, choice of law, and the effect given to judgments rendered by sister states, offer useful insights into transnational problems. Taking account of constitutional and international realities, Professor Batiffol's functional approach is of considerable utility in ordering the coexistence of state and national legal systems. System coordination is a beacon

in the unspent winds of change that sweep contemporary conflicts law.

Professor André Tunc focuses on the legal development of civil liability. He perceives a gradual move away from the primitive position which lets the loss lie where it falls to a more civilized position which shifts losses from the innocent victim to the shoulders of the person who through culpable conduct (action or inaction) caused the harm. Fault liability in the sense of negligence—*culpa*—or at the higher level of intent—*dolus*,—is the end product of a process which involved the policy differentiation of contract and crime from the province of the ordinary law of delict (the civil law notion of tort).

The nineteenth century legal mind emphasized individualism on the basis of the policy of *laissez faire*, in the framework of which the legal order provided security for transactions through the law of contract so that men and women could plan for the protection of their choices. The ethics of the conventions and constitutions of the law of contract, and indeed, the authority and control of the law itself, rested upon consent; the parties to the contract could only incur obligations by consent. Occidental society used contract law to protect nascent technology by not subjecting industries to non-contractual liability without the private investor being guilty of blameworthy behavior. At the same time, the principle of no civil liability without fault encouraged the free initiative of the individual. Fledgling industrial enterprises were not crippled, and private enterprise was promoted as the motor of development spread progress and prosperity throughout society.

Professor Tunc views the twentieth century as exerting new demands that are intensified by the structure of our modern commercial economies based on mass production. Accidents that are inherent and unavoidable as a result of living in an environment with ever-increasing exposure to machines and other technical and electronic devices should alert one to the risk of harm. To a significant degree, the harm that each of us encounters is not a consequence of one's own carelessness. To be sure, the harm has two dimensions of seriousness: first, it involves statistically unavoidable mistakes, irrespective of whether one is the most alert person—that is to say, casualty is inevitable even for the reasonable person or *bonus paterfamilias*; and second, it has the potential of being so severe to one's person or treasures that it will extend beyond the victim's capacity to bear the harm.

In order to come to grips with exposure of the person to accidental risks in the community—side effects of the growth of the new industrial state—Professor Tunc seeks to improve tort law as well as to establish timely accident law as a matter of practical importance. He focuses on a new development of risk liability, and mindful of strict liability in Roman law, he sees *la responsibilité civile sans faute: la responsibilité pour risque* on two levels. Level one is the admission of strict liability for certain types of accident by the law of tort, whether by either evasion, limitation, or restriction of the principle of fault. Level two is the next stage of development whose purpose is compensation for harm suffered in motor vehicle accidents without reference to fault. In particular, the increasing mass phenomenon of casualties caused by automobile drivers and the appropriateness of the insurance contract as a collective means of indemnification against specific harm renders compensation just as reasonable and fair a ground of *responsibilité civile* as is fault.

Error is shown to be a justification for liability which relates to the circumstances of the event by necessary dissociation from fault and equation with accident. Fault is socially blameworthy human behavior, while mistake does not involve a deliberate choice, but unavoidable aspects of daily life, instanced by moments of inadvertence, unfortunate reactions, reflexes, lapses, or slackening of attention. Error in fact addresses even the most respectable citizen. The reasonable man, woman, or child, who is actually sagacious, careful, diligent, and mindful of other persons in the community, cannot escape mistakes. *Casus fortuitus non est sperandus, et nemo tenetur devinare.* In short, errors are fortuitous mishaps where harm ensues by mistakes that result from human weaknesses (ignorance, fatigue, fraility, fallability). Unforeseen or unpreventable events arise not from any fault in the individual person, *vis major*, or *force majeure*, but rather from the use of machines in which human and mechanical imperfections continue in statistically unavoidable casualties.

In Professor Tunc's judgment, this imperative dissociation of error from fault appropriately establishes a unified regime of civil liability that avoids the cartesian dichotomy between the insured road user who is a driver with practical civil immunity, and the uninsured pedestrian or cyclist who must bear the costs of his or her own mistakes. Instead, the motorist must compensate for the harm he or she is likely to cause regardless of his or her actual errors. Moreover, fault is rationally preserved to serve the

contemporary function of guaranteeing citizens' rights by expecting all motorists to drive as reasonable persons attuned to contributing risks in relation to their inconsiderate conduct.

Professor Louis Vogel focuses on the three key questions:[1] first, *what* realistically is being compared?; second, *for what purposes* of comparison?; and third, *how* can the comparison be fruitful of its goals? In other words, comparative application is the harnessing of the purposes of comparison as guides and supports for the right results (short-term outcomes and longer-range effects). The observer must clearly delimit his or her focus of inquiry. The intellectual techniques for relevant and useful comparative study are themselves relative to the adequate attainment of the task, the objectives of revealing latent social functions and internal structures consonant with patterns of a free society.

Professor Vogel shows that the learning experience of student law reviews, legal aid forensic clinics, and moot court competitions are relatively alien to French law schools. Like their French counterparts, however, the foremost law schools in the United States are concerned with training students to master an intellectual discipline and to develop powers of analysis, rather than to engage solely in professional training and concentrate on teaching lawyering skills and techniques more appropriate for the bar examination. The American case method has been adapted to include the study of legal policies through a jurisprudential approach. It abhors the lecture of institutional history and eschews the exercise of formal logic, seeking instead to reveal social and political problems lurking behind operative facts that impact upon authoritative decision making, that is, to flesh out the realities of life.

Law school in France is often a component credential of your *cursus honorum*. There is no elite school for lawyers equivalent to the school for bureaucrats (*École Nationale d'Administration*) or the school for judges and public prosecutors (*École Nationale de la Magistrature*). A legal career requires something more than a theoretical law school education; for law professors, it requires a dissertation, its "defense," and a special oral examination. When a student chooses to go to law school,

[1] Professor Vogel employs an approach that was previously utilized by Professor Myres McDougal. *See generally* McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 AM. J. COMP. L. 24 (1952).

he or she will want the *Maîtrise en Droit* degree for its broad field of study and theoretical training, with courses spread over two semesters in a four year degree. The French elites in the civil service, bench and bar, politics, and business are socialized to share common societal values, and all determine the climate for the functioning of the law. This trend to homogeneity is fostered by the style of decision making in the judicial and related process—discreteness, rationality, and anonymity are the powerful watch words. The grounds and policies of decision are inarticulated and dissents are incompatible with the collegial composition of the forum and its competence to speak to the world outside as a single authority in upholding the law. By the same token, the *Cour de Cassation* (one hundred and six judges) in Paris does not actually reverse the decision of a lower court; it fosters and maintains legal unity through six civil chambers and one criminal chamber (quorum of seven judges) by quashing (cassere) the judgment below and indicating to a hierarchically equal lower court in the legal system why it ought to reverse itself on the law and how it should rewrite its judgment. Threats to the unity of the *Cour de Cassation* are forestalled by coordinating the work of multiple chambers and referring tie votes to the ad hoc *chambre mixte* (nine to twenty-five judges).

In the United States, pluralistic values are sought from the legitimate voicing of dissenting and concurring opinions, even long, discursive, and all too frank opinions which express both doubts and disagreements with the plurality and admit compromises and broad exercises of discretion. The large degree of diversity associated with a free society is cultivated by the uneven recruitment of faculty and students, by the uneven identities of law schools, and by ordering law school curricula and fields of concentration with numerous electives, a wide range of legal materials for instruction, and contemporary course content. This diversity is further promoted upon law school graduation by a *cursus honorum* which emphasizes clerkships with judges and associations with law firms of varying outlooks. In short, ways and means of the law are designed and applied by the participants to seek the ends of the law in an ever-broadening consideration of socio-economic and human values. These values transcend state lines and form the basis of individual rights, which are themselves intimately associated in the community of human dignity. The rich and complex ordering of society, the relationship between legal training and socialization, and the legal mentality in

society are deeply practical, purposive, and diverse for the American, and deeply attentive to form, substantive conciseness, and unity for the French.

For Professor Vogel, as for his mentors in France and America, the legal reasoning of comparative research is the method of thinking about law that addresses the demands of life. The approach to law must work in practice and must yield to both social reality and social ideal—criteria which engender comparisons across legal cultures, sister states, and national boundaries. He does not allow himself to get sidetracked by junctions, detours, and deadends of contrapuntal conceptions of law and professional training in common law and in civil law countries; he even refuses to identify fundamental and inescapable antinomies, amassing legal paradoxes, and anecdotes. Nor does he render a critical legal study of disindoctrination and destructiveness, which were formerly associated with the infancy of legal realism and its founding in the post war changes of the American twenties.

Professor Vogel judges a legal system by the results it produces in real life, by its operational code rather than by texts of statutory enactments and court procedures. Discrepancies between what is prescribed, what is expected, and what actually occurs; between substance and perception; and between legal ideals and legal reality behoove a functional approach. His is a functional analysis that treats the essential interrelatedness and interdependence of normative considerations and empirical significance that rationally accounts for the application and configuration of purposes underlying both individual transactions and the legal order as a whole. This approach manifests reality, sheds light on necessary congruence, and brings law into focal view as a process of decision making in France and the United States. This process is multifunctional: Law can satisfy, deflect, arrest, or crash traditions; confirm or accelerate social reform and responsibility in order to respond to new social needs; and maximize human rights.

We lawyers often deal with a much too restrictive conception of what law is. Our notion of law is frequently a concept of official law, of "law of the State." From a more holistic, anthropological point of view, law is not only contained in legal rules or in cases. Both are considered as the legal fictions which constitute the myth system of the group. In such perspective, legislators and judges are not the sole decision-makers. The official deci-

sion-makers, unconsciously or not, arbitrate between the different conflicting "laws" existing within the same society. It is thus not enough to train law students to operate within the myth system. Furthermore, this mythical conception of law hides the profound similarity of the functioning of each legal system. What appears throughout the essay of Professor Vogel is that legal systems have some basic and permanent features and satisfy identical functions. In terms of structures, each legal system will be composed of decision-makers who will have authority to make decisions which will be applied "equally" and be provided with sanctions. In terms of function, these decisions will consist of choices which will settle disputes among a given social group.

The final purpose of comparative studies should not simply be translation of one system into another, but discovery, through this equation, of the basic principles on which all systems are built. Finally, such studies should not be limited to the comparison of the official legal systems but should also concern the legal systems of the different subgroups which a given legal system contains. Professor Vogel brings out the importance of the objectives of consistency which the official legal system tries to enforce, especially through its educational subsystem. Such action can only be fully understood if one conceives the law of the state as trying to obstruct and to fight other coercive orders, in particular those of lawless violence and terror-violence, and to establish civic order. Actually, the choice between centrifugal and centripetal organization illustrates two different strategies state elites can develop in order to have an agreed legal order override other normative orders in a free society.

Law is a relative phenomenon. True comparative studies need a comprehensive theory about law which takes into account this relativity and permits cross-cultural comparison. Occidental concepts and categories do not englobe all law. A more flexible tool is needed, stressing basic attributes in order to reproduce a true picture of the societal structure. Law cannot be separated from human, societal values.

Professor Michael Perlin demonstrates the viability of legal transplants from a civil law donor system in Germany to common law recipient systems in the United Kingdom and the United States. The legal phenomenon of transplantation, illustrated here by strict liability for accidents in the work place, does not respect state lines. It is not scared away by other cultures and is as old as law. Jurisprudes like Dean Pound and legal anthropolo-

gists like Professor Leopold Pospisil quite freely acknowledge that law is a historical borrower and a host of assimilated materials far outside its bailiwick. Cultures develop from transplants gained from fortuitous contacts. The process of development continues apace for the transplant, which is decisionally adjusted as a product of the new system. Legal transplantation cannot be appraised by classification (macro or micro transplants, voluntary or imposed reception, open or covert migration). Its existence in a non-parent legal system, according to criteria of substance and style, suffices to say that law is not, as declared by Von Savigny in nineteenth century Germany. Law is not derived from the metaphysical *Volksgeist*—the mythic people's spirit whose common consciousness naturally confirms the *Volksrecht*, the people's law. The significant transplantation around the world of both the English common law and the Roman civil law belies this. For Marx and Engels, the other leading historicalists, the distinctive group spirit is not diffuse and subject to environmental conditions. For them *Klassenrecht* is the product of the wealth process and the expression of the proletariat and the bourgeoisie in their natural class conflict for an egalitarian group spirit to wither away the law.

Professor Perlin does not see the validity of law as an organic and natural development. Both the *Volksgeist* and the *Klassengeist* are fatalistic. Nor is law metaphysical. Rather, law is what living people say, think, and do to each other by way of decision. The determinant for grafts and legal mutations to succeed by producing enduring trends of decision is, actually, the felt needs of the individuals who establish and contribute to a concrete territorial community and who develop interstate as well as transnational processes. In sum, the authority of law is a matter of social significance, not one of transempirical validity. Nor, for that matter, do rules and information about their content make fundamental political, economic, social, and moral choices; nor decide the structure of the legal order and society—people do. People everywhere demand values, share identifications, and share perspectives in their relations. In this arena of human action and inaction—the interdependent eco-social process—individuals crystallize legal and political expectations. Law, as Lenin put it, is a political instrument. But for France and the United States, as Professor René David cautioned, politics is not supreme but rather subordinate to human dignity and effective human rights, of which property law, tort law, criminal law (classified as private

law in France), and contract law are illustrative of the more determined human rights. The *sine qua nons* for lawful decision are the empirically established common human aspirations that have become the aggregate legal convictions (the *boni mores*) of the community concerning what is substantively and procedurally right for events and incidents. The focus is on the effectiveness of law—the difference between what people say and think, or predict and presume, about outcomes of decision (*rights in appearance*) and the actual extent of their shared legal expectations as implemented in human conduct. For a democratic society unreservedly and unequivocally committed to values of human dignity, it is imperative that there be full participation of all individuals in decision making conjoined with the actual clarification and implementation of common interests. In short, *rights in reality* involve nothing more than a confluence of patterns of authority (authoritative decision) and control (effective power). Their disjunction results, on the one hand, in a hollow, myopic decision (merely saying that one has competence to act as official or agency) and, on the other hand, in naked totalitarian power (functionally determining results). A law predicated upon human dignity values is a flow of stable patterns of authoritative decision by which levels and aspects of both authority and control are modulated as a process of decision making.

Europeans may seem to suffer from an historical overload. As Professor Perlin shows, there is a legitimate historical task, which law schools on this side of the Atlantic seem to neglect in emphasizing current practical consequences, namely the description of past trends in decision beyond the contemporary decade. This is an intellectual task of considerable importance, as those that control the past have often controlled the future. Past processes of decisions relevant to the law under study just as easily postulate values of human indignity. Decisional trends crossing both national and temporal lines must be systematically described in terms of their contributions to the ends of a law of human dignity. Net gains and net losses are determined in terms of values that are clarified as the applied purposes of past, present, and future decision.

Professor Perlin adds to the essay of Professor Tunc, as Professors Vogel and Batiffol do, by highlighting the nineteenth century refusal to treat the law of tort as a sacred cow. As Justice Holmes once noted, "[s]ound policy lets losses lie where they fall, except where a special reason can be shown for interfer-

ence."[2] In the early twentieth century, the Court of Appeals of New York declared: "It would be quite as logical and effective to argue that this legislation [imposing casual liability on employers for industrial accidents in certain dangerous enterprises] only reverses the laws of nature, for in everything within the sphere of human activity the risks which are inherent and unavoidable must fall upon those who are exposed to them."[3] The court went on to find the statute on workers' compensation unconstitutional, observing that "[t]he Constitution . . . in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault."[4] Despite such immutable expressions of law, legal policy openly jettisoned the principle of no liability without fault for industrial accidents, beginning with Bismarck's patriarchal system of workers' compensation in the 1880's. The cost of industrial accidents today are borne not by the blood of the worker, but by society on the basis of a dual policy: as a factored cost item in the price of the product and as a factored item of social insurance. This serves to open the door to a comprehensive system of accident insurance for personal injuries that looks forward to the twenty-first century, as implemented in New Zealand, long-advocated by Professor Tunc, and now before the French Assembly. The government bill under discussion by the French Legislature in June 1985 represents a trade-off between full compensation for all accident victims and economic limitations.[5] It provides for compensation of pedestrians, motor vehicle passengers under sixteen years of age or over seventy, and disabled persons recovering social security benefits for a disability of eighty percent or more—regardless of any circumstances of *force majeure* or any fault attributable to the victim or a third party.[6]

The articles of Professors Batiffol and Tunc of France were originally published in French and their English translations published herein are accompanied by the original French versions. The two articles were translated into English by a team under the direction of Bernard Cohen, Esq., in Paris. The other members of the team were Judith McMillan Fine, Sabine Marchal, and Brian Treacy. Alternatives made to enhance the original are with

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[2] O.W.HOLMES, THE COMMON LAW 51 (1881).

[3] Ives v. South Buffalo Ry., 201 N.Y. 271, 284, 94 N.E. 431, 444 (1911).

[4] *Id.*

[5] *See* JOURNAL OFFICIAL DEBATES PARLEMENTAIRES SENAT (No. 6 S) 183 (April 11, 1985).

[6] *See id.*

the sanction of the authors. Publishing the works of such esteemed scholars, along with original articles by Professor Vogel of Paris, and Professor Perlin of New York, contributes significantly to Franco-American cooperation and enhances closer collegial and legal bonds in the service of human dignity—master and mistress of the law.