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The Hunt for Truth in Comparative Law†

In this response to Pierre Legrand's dense and provocative account of my differences with James Gordley, I express some gratitude for Professor Legrand's kindness, some dismay at his account of Gordley, some uneasiness about the use of literary theory in comparative law, and not least my admiration for Legrand's deft and inventive writing. While I gladly acknowledge that there is a kinship between his attitude toward scholarship and my own, I insist that I have by no means given up on the hunt for truth.

Introduction

I feel at a loss for words. Who would not feel at a loss for words after being plunged into Pierre Legrand's dizzying torrent of wordplay, and after hearing his somewhat disorienting praise? My first instinct is to distance myself from much of what he writes, since I have always been put off by the sort of literary theory he exploits. (I began my intellectual career in comparative literature, not comparative law—and fled.) I am not sure how much sense it makes to think of law as a "text," and I worry that comparative law will lose its audience if it indulges in language that is too dense and baffling. Legrand also leaves me feeling more than little indignant on behalf of my friend Gordley, whose portrayal in his article strikes me as ungracious and unfair.

Still, whatever my doubts, I have to say that Legrand's article, with its acrobatics and its subversive account of the sociology of scholarship, strikes me as a classic in the genre, undoubtedly the best piece of work of the kind that we will ever see in the field. And I have to admit that he has gotten me right in many respects. At least I think so. In any case, I am glad for the chance to revisit my differences with Gordley.

I.

Let me begin, though, with why I feel indignant on Gordley's behalf. Here I must do my best to translate Legrand's dizzying

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argument into my own more pedestrian idiom. Legrand, as I read him, writes in the spirit of the shrewd French anthropologist and social critic Pierre Bourdieu. That is to say, he portrays the academic discourse of comparative law as an integral element in the institutional sociology of the field, and he portrays that institutional sociology as a kind of system for the production of "distinction"—of the sort of social honor that Bourdieu writes about so perceptively.[1] The world of comparative law, on Legrand's account, is something like the world captured in group photos of provincial learned societies of the nineteenth century: It is a stuffy world, fond of vacuous honors. The stuffiness and vacuity of the academic social order produces, and is reproduced in, a stuffiness and vacuity of the academic mind. The fondness for honors in this world is central to its workings. Comparative lawyers like to confer awards on each other for their "scientific" advances. Yet their supposed "science" is a sort of gibberish, best suited to being lampooned by a Rudolf von Jhering, or even better by Gilbert and Sullivan or L. Frank Baum. James Gordley is a product of the ills of this world. James Whitman by contrast defies it. Whitman writes rude reviews that poke fun at the sociology of honors and raises fundamental doubts about the value of the supposed "science" of comparative law.

There may be some truth in all this, but first things first: There is nothing stuffy or vacuous about the man James Gordley, and nothing stuffy or vacuous about his work. His career, and his life in the law, cannot by any means be explained by reference to the academic sociology of honors. On the contrary, Gordley has done considerably more to defy the system of honors than Whitman has. The sociology of academic distinction in the American legal academy has to do first and foremost with the cursèd rankings of the U.S. News & World Report. Gordley cheerfully descended a number of rungs in those rankings in order to join a faculty where he could lead a more fulfilling and companionable intellectual existence. There are not many scholars in America who make such choices. It is perfectly reasonable to disagree with Gordley's idea of the science of the law but unfair nonsense to think of him as anything but a man ready to lose himself completely in the life of the mind. People like Gordley are a treasure, and there are far too few of them.

As for James Whitman: I hunger for honors, undoubtedly more than Gordley does. I certainly enjoy seeing articles go into print praising me! In that sense, Legrand has me wrong. But he *has* correctly noted an unfortunate truth about me: I have indeed written rude reviews—the worst of them, the review of the admirable Patrick Glenn from which Legrand reproduces some painful quotes. I am glad to have this chance to say how much I regret having put

1. *See generally* PIERRE BOURDIEU, LA DISTINCTION: CRITIQUE SOCIALE DU JUGEMENT (1979).

it into print. I hoped it would remain buried. It is nasty nonsense. I think I wrote it for two reasons. First, my review appeared in the *Rechtshistorisches Journal*, a publication that at the time encouraged a culture of mockery, into which I should not have allowed myself to be drawn. Second, I envied the courage of Glenn in tackling the immense subject of *Legal Traditions of the World*, and like other envious people, I wrote something spiteful. I will only say in my defense that I did make an effort to discuss methodological questions in that review as well, in parts that Legrand does not choose to quote.

So I do not think that the biographies either of James Gordley or James Whitman make good cases for the Bourdieuian sociology I take Legrand to be proposing. On the contrary, his use of our names leaves me alternately incensed and ashamed. At the same time, I fully recognize that the test of a sociological account is never whether it correctly describes every individual case, and I am more than ready to salute Legrand for proposing it. Of course, he must be right, on some level of generality, that academic life involves a great deal of mutual citation, stroking, and congratulation. Yes, he must be right that we should shake off our belief that we are in pursuit of a "truth" that can be understood outside of the institutional context of the discipline that produces it. Maybe he, like me, writes a bit in a spirit of resentment and spite, but he has managed to turn his resentment and spite into authentic insight. That is something that does not come along very often.

II.

Let me now move on to my understanding of my differences with Gordley, and to what is right, what is doubtful, and what is insightful in Legrand's account of it. Legrand treats Gordley as a "positivist" who is "actively working toward the preservation of the established epistemic order."[2] That is not how I would describe him. I see Gordley as a man who belongs to a grand juristic tradition that draws heavily on the methods of philosophy, and especially on the methods of Aristotelean philosophy. The working assumption of this tradition is that we—and the "we" includes persons of good will from every era and every clime—can reflect together on the common problems of humankind. In particular, we can reflect together on problems in law and hope to come to common agreement on what is right and just. The sorts of problems that preoccupy Gordley are in particular the presumptively universal ones of the core subjects that are customarily taught in the first year or two of legal education—in American terms the problems of tort, contract, and basic criminal law. These

2. Pierre Legrand, *Jameses at Play: A Tractation on the Comparison of Laws*, 65 AM. J. COMP. L. (SPECIAL ISSUE) 1, 13 (2017).

are domains of the law that typically analyze transactions between two parties that pose problems that lend themselves to analysis using the basic tools of moral philosophy: Should persons be bound by their promises? When should they be held to account for the harm they do to others? Because these domains involve what are arguably basic moral problems that are common to all mankind, they seem to call for a scholarship founded in moral universalism. Gordley believes that there are ultimately right answers to such problems,[3] just as Aristotle believed that there is a right way to order human society. He believes that if you sit thoughtful people down in a room together and present them with the basic questions of the law, there is good reason to hope that they will arrive at agreement about the answers.[4] It is precisely the long work over the ages to establish those right answers that has produced the law.

Now, Gordley's view of the law seems to me honorable and beautiful; in some sense I am for it, but in the end, I think it is hopeless. My objection, however, is not that Gordley is too "positivistic," or too committed to "the established epistemic order."[5] To say such things is to misjudge his mind, and his sense of mission. Gordley is a philosopher, and an idealist in more than one sense of the word. He believes that the law has a just form that is at best imperfectly realized in the world we live in today.[6] That sort of philosophical idealism has nothing to do with positivism. From Gordley's point of view, it would be a thorough mistake to accept the positivistic notion that the only law that has authority is the law as it exists on the books today. The "law" is something that we are striving to find, not something that can be looked up mechanically in a law library. Gordley's attitude toward the law, if I understand it correctly, is thus about as remote from banal law-office positivism as it gets. In fact, Gordley is much less of a positivist than I am. I take pleasure in grubbing around in the nuts and bolts of contemporary law on topics that I think Gordley must regard as mere juristic detritus—law on law-office topics like pharmaceutical regulation, credit reporting, or vacations. To me these are topics that are both amusing in themselves and revealing about the human world that has produced them. Gordley thinks of the law as a subject for fundamental moral reflection, not as a source of amusement about the human condition, and he is determined to look beyond the detritus of this world to see deeper truths.

Beautiful indeed, but to my mind hopeless—but not, once again, because it is "positivistic." Gordley's aspirations for the law simply

3. I put the accent here on "ultimately." See Gordley's careful and extremely thoughtful account, acknowledging the complexities in realizing the "principles" of the law, in James Gordley, *The Universalist Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 31 (Pierre Legrand & Roderick Munday eds., 2003).

4. *See id.*

5. Legrand, *supra* note 3.

6. *See* Gordley, *supra* note 4.

seem to me to rest on a considerable overestimation of human capacities. The human world, as I see it, is much too immense, much too varied, and much too much prey to contingency to permit the confident search for "the" law. The point was made beautifully by Patrick Glenn, with his call for "sustainable legal diversity in law."[7] Human beings are too attached to beliefs and convictions that they have absorbed during their daily lives—beliefs and convictions that they have no energy to question, and that outsiders are rarely entitled to deem either right or wrong. The world is not a philosophy seminar room, or even a courtroom, and it is simply not the case that people of good will can be expected to arrive at the same answers, or even to perceive the world as throwing up the same questions. It is misleading to focus on the relatively simple and often stylized problems presented by the basic law courses in tort, contract, and criminal law. People, especially people brought up in the western tradition, often share inherited intuitions about basic morality that make it more likely that they will take similar views. But even in those areas there are dramatic differences among contemporary western legal cultures—differences that seem manifestly rooted in broader cultural dispositions. The differences, like all differences in human affairs, are partly the result of historical contingencies, which must be traced.

Our debate over privacy law, highlighted by Legrand, is indeed a fine example of our clashing views. Gordley, echoing the accounts of a distinguished line of European jurists, takes a majestic view of the law, describing a great juristic conversation over the problem of privacy that extends at least as far back as the Roman jurists on *injuria* and includes not only French and German jurists of the nineteenth century, but also the eminent Americans Warren and Brandeis. He acknowledges that the law differs from country to country, and especially as between continental Europe and the United States, and somewhat more broadly the common law world. Nevertheless, he sees large areas of agreement—after all, the Warren and Brandeis tort *has* occasionally been recognized by American courts; perhaps the recent Hulk Hogan affair suggests that it may come back to life, at least in the most egregious cases;[8] meanwhile, the English courts are shifting gears under the pressure of the Human Rights Act.[9] Gordley wonders what could possibly bar an ongoing conversation about the law of privacy that will allow all of us to learn from

7. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (5th ed. 2014).

8. *See, e.g.*, Nick Madigan, *Jury Tacks on $25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), http://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html.

9. *See, e.g.*, Basil Markesinis, Colm O'Cinneide, Jörg Fedtke & Myriam Hunter-Henin, *Concerns and Ideas about the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133 (2004).

each other.[10] Why should we say that the law differs, rather than saying that we have differences over the law that can ultimately be reconciled?

Unsurprisingly, I see the obstacles to finding the right answer as running deeper. This is partly because, like Glenn, I do not believe that there need be a single right answer. There are a few issues on which it seems imperative that the world should speak with a single voice—the ban on genocide is the obvious example—but they are very few indeed, and for the most part they are issues that must be dealt with by means other than law, in particular by means of war and diplomacy. When it comes to the ordinary stuff of daily life, it is perfectly acceptable, and in fact desirable, that the legal orders of the world should differ—that for example the contract law of different western countries, closely related though they are, should differ in ways that contribute to the making of different sorts of economic ordering.[11]

The comparative law of privacy shows particularly dramatically how deeply these closely related countries differ, and in ways that suggest deep divergences in our underlying perceptions of the demands of justice. The differences do not just have to do with classic private law problems: It is not merely the case that we differ over what should be done if Party A tortiously violates the "privacy" (whatever precisely that is) of Party B. They also have to do with a host of modern legislative and judicial programs, touching on areas as fundamental to the organization of modern society as credit reporting. Year after year new conflicts break out, including most recently conflicts over the "right to be forgotten"[12] and the permissibility of the U.S.-EU Safe Harbor Agreement.[13] Vast sums and great decisions in foreign policy depend on how we resolve, or fail to resolve, these differences. It is impossible to understand our conflicts unless we recognize that they are rooted in clashing, and ultimately irreconcilable, conceptions of what "privacy" involves. And while it is perfectly possible for individual Americans to prefer the European approach and vice versa, it is exceedingly unlikely that we will all sit down together and agree on what "the law" requires: Prevailing

10. *See* James Gordley, *When is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States*, 67 LA. L. REV. 1073, 1099 (2006–2007).

11. *See, e.g.*, Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1, 26–27 (Peter A. Hall & David Soskice eds., 2001); Aditi Bagchi, *The Political Economy of Regulating Contract*, 62 AM. J. COMP. L. 687 (2014).

12. For a conflict that never seems to end, see for example, Mark Scott, *Google Appeals French Privacy Ruling*, N.Y. TIMES (May 19, 2016), http://www.nytimes.com/2016/05/20/technology/google-appeals-french-privacy-ruling.html?ref=world.

13. *See, e.g.*, Duncan Robinson, *EU and US Reach Deal on Data Sharing*, FINANCIAL TIMES (Feb. 2, 2016), http://www.ft.com/intl/cms/s/0/7a9954d2-c9c8-11e5-be0b-b7ece4e953a0.html#axzz3z6oZIoAp.

perceptions of the sorts of rights that are endangered by modern life differ too much on either side of the Atlantic—and there is no principle of moral philosophy that condemns the existence of such differences.

Gordley thinks that we can find an ultimate measure of truth and justice; I think that while such an undertaking might be possible for God, it is certainly not possible for Man. That is the core of our dispute, but there is more to it as well. I subscribe to the widespread American belief that "the law" should be understood as the law in action. We cannot content ourselves with the bare text of the law but must understand how the law is applied in practice. Because Gordley values the deliberations of jurists so much, he thinks of "the law" as something whose working materials are found in the reasoned texts that the jurists produce. Because I am primarily concerned with the law in action, I am more inclined than Gordley to read between the lines, hunting for hints of taken-for-granted assumptions.[14] I am also more inclined to spend time sifting through commentaries on code language, as well, of course, as case law.[15] Our debate over the law of privacy has been conducted partly across this familiar divide between those who study law on the books and those who study the law in action.

Our debate also reflects our clashing views over the place of historical contingency in human affairs. I hold to the historicist credo of figures like the theologian Ernst Troeltsch: Human beings live in their historical moment, and there is little expectation that they can ever fully escape it. We are certainly entitled to believe, as Troeltsch did, that there are ultimate truths,[16] and it should be our mission as scholars to reflect critically and creatively on the values of the societies we study. In the end, though, scholars are condemned to live in a world of an irreducible, and constantly shifting, variety in values.[17] Certainly the overwhelming bulk of humanity lives out unreflective lives that rest on taken-for-granted assumptions produced over generations of unexamined experience. We are all, scholars and laypeople alike, captives of the historical moment in which we find ourselves.

The account of the comparative law of privacy that I offer is an account of that sort of historical contingency. It begins in the mid-eighteenth century, as old status categories began their

14. Looking beyond the text of the codes seems to me especially important when we trace questions of social hierarchy, since western law has largely been framed, misleadingly, in terms of formal equality; this is one of the most significant legacies of Roman law. *See* James Q. Whitman, *Long Live the Hatred of Roman Law!,* 2003 RECHTSGESCHICHTE 40 (2003).

15. *See, e.g.*, James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L. J. 1279, 1323 (2000).

16. *See* Ernst Troeltsch, *Der Historismus und seine Probleme*, *in* 3 GESAMMELTE SCHRIFTEN 2 (1922).

17. *See id.* at 694–730.

epochal western shift toward new patterns of egalitarianism, and it is emphatically about what has happened over the succeeding couple of centuries in the western world, not about universalities of the human experience. There is little room for historical contingency in Gordley's account, of course, and his critique of my argument revolves largely around the assertion that what I say about the law in action as it emerged in the turbulent centuries after 1750 or so is not true of the reasoning of the jurists of Antiquity or the Middle Ages.[18] Needless to say, I think that critique misses the mark.

Such are my differences with Gordley as I understand them: They are fundamentally differences over the human predicament that yield differences over how to practice comparative law.

CONCLUSION

So how close is my reading of the Whitman/Gordley debate to Legrand's? Legrand certainly shares my historicism.[19] But for the most part, if I understand him correctly, he pitches his argument in a different key. To Legrand, the debate turns on the question of whether "the law" has any sort of stable meaning. His "James Gordley" imagines that there can be some sort of encounter between the human mind and the text of the law that yields a definitive meaning to be determined through positivistic reading.[20] His "James Whitman" believes that the text of the law can never be reduced to a single meaning.[21] This is partly because text is inextricably interwoven with culture, but also partly because different minds will always see different truths in the text. For that reason, Legrand celebrates my use of the first-person singular, which bespeaks the ultimately monadic and infinitely variable nature of the encounter of minds with the law.

Now I resist a great deal of this interpretation. First of all, to say it one last time, I do not believe that Gordley thinks that the text of the law conveys a single authoritative truth. In his view, the texts with which he works are part of ongoing collective effort to find an ultimate truth that we have not yet succeeded in fully uncovering.[22] Second, I am not ready to accept the proposition that the human experience of law is easily analogized to the reader's (or the critic's) experience of a text. There are certainly useful analogies. It seems to me true enough that no literary author is fully in control of how his text is created or how it is received. In much the same way, no

18. *See, e.g.*, Gordley, *supra* note 10, at 1085–87.
19. *See* Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT'L L.J. 517 (2006).
20. *See* Legrand, *supra* note 3, at 74.
21. *See id.* at 62.
22. *See* Gordley, *supra* note 4.

"author" of the law is fully in control. It seems to me that ordinary actors do to some extent respond to the law in ways that resemble how readers respond to literary texts: There is a kind of romance of the law that gives it its life in the popular mind. But at the same time, the law is manifestly shaped by social and economic forces that are not well described through the techniques of literary theory, and I would prefer an argument that reckoned more with the limits of what literary theorists have to offer.

As for the first person singular: I certainly agree that the hunt for ultimate truth is destined to fail, but I am not prepared to concede that we cannot arrive at lesser degrees of truth, and probably more by way of lesser truth than Legrand believes. My use of the first person singular does indeed personalize my account to some extent. I believe, to adopt the language of nineteenth-century German hermeneutics, that understanding of a foreign time or place requires a practice of *Einfühlung*, of empathetic understanding, that must inevitably be conducted by the individual scholar. There is no way to understand an alien culture without throwing oneself into it. But that does not mean that individual empathetic interpretations are purely arbitrary. There *is* a test of the truth of what the individual scholar says: That test is whether his descriptions seem right and plausible to others who know the cultures he describes, and whether they seem to make sense of what would otherwise be confusing phenomena. Conscientious scholars must submit themselves to that test: They must present their evidence to others, and they must pay attention when they receive skeptical responses. Through conversation with others, our conclusions attain a kind of verifiability—though they may never rise to the level of unimpeachably scientific falsifiability. Of course, it is our subjectivity that leads us, if we are lucky, to our insights. Nevertheless, we are bound by what the evidence tells us and by whether our interpretation of that evidence seems convincing to intelligent interlocutors.[23]

The notion that we can attain a measure of truth through *Einfühlung* of this kind may seem hopelessly solipsistic, and thoroughly inadequate, to some philosophers of science. Nevertheless, I believe that it is what humanistic scholars do, and *must* do; I believe that the fact that it may be done in a bad, solipsistic way does not mean that we should not try to do it; and I believe that comparative law must be largely a humanistic endeavor, especially when it comes to topics like privacy—though I also believe that there are other important approaches, for example in comparative political economy. Truth-through-*Einfühlung* is not the sort of eternal, transcultural truth that Gordley seeks, but I do think that it *is* truth. In

23. *See* Arnaldo Momligliano, *History in an Age of Ideologies*, 51 AM. SCHOLAR 495 (1982).

particular, I do think that what I have written about western privacy cultures since the mid-eighteenth century is true, and not just my idiosyncratic view. If Legrand thinks differently about my work—and I am not sure whether he does—I protest. But to the extent he is an advocate, as I am, of humanistic approaches to the inescapable, and welcome, diversity of the human experience of the law, I embrace his comradeship.