Journal of Civil Law Studies

Volume 12
Number 2 *2019*

Article 13

12-31-2019

James R. Maxeiner, Failures of American Methods of Lawmaking in Historical and Comparative Perspectives

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FAILURES OF AMERICAN METHODS OF LAWMAKING IN HISTORICAL AND COMPARATIVE PERSPECTIVES, by James R. Maxeiner, Cambridge, 2018, ISBN 978-1-10719-815-9, 358 pp, $110.

Introduction

There is no riskier comparative-law activity than engaging in an overall critical analysis of one's own legal system using outside perspectives. The editor-in-chief of this Journal has had this experience, receiving praise from the comparatists but meeting the silence of the autochthone jurists: no review of his book was ever published, at least in the targeted country.[1] The Journal of Civil Law Studies salutes the publication of James Maxeiner' Failures of American Models of Lawmaking in Historical and Comparative Perspectives. It is without a doubt a controversial work and we found no better way of calling the attention of our readers to this highly stimulating book than creating contrast. We had it reviewed by a United States-trained scholar and by a bijural scholar trained in Germany and the United States, hoping to bring a diversity of readers to the actual book and generate rich and fertile discussions.

O.M.

1. OLIVIER MORÉTEAU, LE JURISTE FRANÇAIS ENTRE ETHNOCENTRISME ET MONDIALISATION (Dalloz 2014).

Review by Scott J. Burnham

I will never forget the introduction to statutes I got in law school. My Contracts professor said at some point, "By the way, there's this thing called the Uniform Commercial Code in the Appendix to your book. You might take a look at it some rainy day." It seems like that rainy day never came for a lot of lawyers and judges, for cases involving the sale of goods are still argued and opinions written without reference to U.C.C. Article 2.[1]

Sometimes it seems like things have not changed all that much in law schools since that day in my Contracts class some fifty years ago. I recently heard of a Contracts professor who is so insistent on teaching Contracts as common law that he deducts points from exam answers if the student brings up the Article 2 rule, even where it is applicable.

Some law schools regard Criminal Law as the antidote to the heavy dose of common law, but my Criminal Law course was more like a philosophy class. I remember at one point the professor expressed concern for our lack of statutory fundamentals, complaining exasperatedly, "You don't know what the elements of homicide are?" My response, doubtless under my breath, was, "Hell, I don't even know what an *element* is." Some law schools now require students to take a token short course in Legislation in the first year, but whatever they are taught about statutes does not seem to stick.

When conducting legal research, for example, even though they know that courts have to follow applicable statutes, law students persist in first searching for a rule in the cases. If they do find a statute, they are at a loss to say what the statute provides unless there is a case telling them what the statute says. A statute is

1. *See, e.g.*, Austin Instrument Inc. v. Loral Corp., 272 N.E. 2d 533 (N.Y. 1971); Rashid v. Jolly, 218 P.3d 499 (2009).

apparently like a tree falling in the forest—it does not make a sound unless a court is there to hear it. In Contracts, the first statute students are likely to run into, U.C.C. section 2-207, is not a helpful corrective, for it may well be a statute that does not mean anything without a healthy dose of interpretation.

Indeed, Article 2 may be a poor introduction to statutes, for it has been described as a "common law code." Much of its application depends on courts to flesh out the meaning of its weasel words. For example, while section 2-302 allows a court to strike unconscionable terms or unconscionable contracts, there is little guidance in the text or the Official Comments as to how to determine whether a term is unconscionable. The statute only makes sense in light of its accreted common law application.

None of this would surprise James R. Maxeiner, whose *Failures of American Methods of Lawmaking in Historical and Comparative Perspectives* excoriates law schools for perpetuating the myth that the law is found in the common law. The first half of Maxeiner's book is a welcome revisionist history. The party line has long been that the United States has historically been a common law country, and only recently have we entered "the age of statutes." Maxeiner points out convincingly that we have always been a nation of statutes, only creating the fabricated common law heritage in the late nineteenth century under the influence of Oliver Wendell Holmes and Christopher Columbus Langdell.

Maxeiner would prefer we laud notables such as David Dudley Field, whose eponymous codes would have codified all of our law. While Field was unsuccessful in getting his Civil Code adopted in his native New York, it was adopted in California in 1872, followed by adoption in several other states, not to mention Guam. Soon after achieving statehood in 1889, Montana enacted its Civil Code, adopting practically wholesale the statutory scheme of California.

Although I had been taught this view of the primacy of the common law, I thought things might change when I began teaching at the University of Montana. Surely, I thought, Montana, as a code

state, would take a different approach to teaching contract law. I was quickly disillusioned. Dean Jack Mudd told me that after he had graduated from the law school and went to work as an associate in a Montana law firm, one of his first assignments was to draft jury instructions in a contracts case. "Use the statutes for the instructions on the law," the partner told him. Only then did he discover that Montana had a statutory scheme for contract law. His Contracts professor—the one I was hired to replace—had never mentioned the code.

On some level this made sense, for most law schools aspire to be national in their reputations. Thus, they would not be so provincial as to teach the law of the particular jurisdiction in which they were located. But Mudd had the insight that the Montana School of Law was not The Little Harvard of the West, and as the only law school in the state, it could have the courage to be true to itself as the *Montana* law school. In accord with Mudd's view that we should be doing a better job to prepare students for the practice of law, I decided to incorporate these statutes into my teaching. Even if a graduate did not practice in Montana, I thought students would find the skills of working with statutes to be of value.

But how do you teach statutes? I have taught U.S. law in civil law countries and found that the answer is often rote memorization. U.S. law students apply the law to the facts and to hypothetical facts from the first day of law school, and while this method may often lead to the unhappy conclusion that law is indeterminable, it also leads to the collection of skills that go by the shorthand of "thinking like a lawyer." If graduates use those skills to practice law, will they really find it so hard to discover common law rules? They will have to find precedents, which their legal research skills (which Maxeiner disparages) should enable them to do efficiently. Because courts follow precedents, they can pretty well predict what the outcome will

be—unless the facts are so different that the rule should not apply. Which, to come full circle, is a strength of the common law system.[2]

Even for those students who end up not practicing law, the critical reasoning skills are doubtless valuable. These skills are valuable because the rules, whether found in the common law or a code, rarely mean anything without a context. And the context in which they are applied is a case. When I put together my own materials to teach Contracts, I vowed that I would never use a case merely to extract a rule. If that is all the case is for, then we might as well just give students the rule, just as we would give them a statute. The value of the case is in analyzing the application of that rule to a particular fact situation.

Here Maxeiner and the civilians might say, "Hold on a second—in that last paragraph you spoke of a rule 'found in the common law' and you said you would instead 'give students the rule.' But you can't do that because unlike the civil law, the common law cannot be found—no one knows what it is. You can't give it to them because it is buried in the past cases and has to be extracted." Maxeiner likes to blast the myths of the common law, but isn't this one of the myths of the civil law—that, unlike the common law, code law is readily available? I am especially fond of the optimistic comment of Wilbur F. Sanders, a proponent of Montana's codification of the law:

> [A] citizen of Montana, who has but little money to spend on books, needs to have lying on his table but three: an English Dictionary to teach [him] the knowledge of his own mother tongue; this Book of the Law [the Civil Code], to show him his rights as a member of civilized society; and the good old Family Bible to teach him his duties to God and to man.[3]

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2. Another weakness of codes is their inflexibility, freezing the law at a particular stage of development. For example, prior to 1979, the Montana Code included Field Code § 13, which provided that "Persons of unsound mind, within the meaning of this code, are idiots, lunatics, imbeciles, and habitual drunkards." Mont. Rev. Code Ann. § 64-104 (repealed 1979).

3. HENRY M. FIELD, THE LIFE OF DAVID DUDLEY FIELD 92 (Charles Scribner's Sons 1898) (quoting Wilbur F. Sanders), quoted in Andrew P. Morriss, Scott

As to the availability of the common law rules, I suspect that for as long as there has been common law, there have been scholars and entrepreneurs who provided us with the short cut of extracting the pure metal rules from the ore of the past decisions. In England, this function was served by Coke and Blackstone. In the United States today, it is served by the Restatements. By giving the students a Restatement principle, I am giving them a shortcut (and a powerful disclaimer needs to be added as to the limitations of this shortcut) to the common law. Thus, the common law rules *are* readily available.

Maxeiner does not have a kind word to say about U.S. legal education, with which he has apparently been bound in an unhappy marriage for many years. He mentions that in the German system, the judges apply the facts to the law to come to a conclusion (where there is no jury involved, I fail to see how this system differs from the U.S. system). He then makes the amazing statement that German law students learn how to do this after they graduate from law school! So, what have they done in law school? One can only hazard the guess that they have spent their time memorizing codes in order to learn the law. But what is the point of that if the law is so readily accessible and knowable?

In any event, I have my doubts that the rules are easy to find in a code. Let's say I am teaching contract formation. If I go to the Montana Civil Code, section 28-2-102(4) tells me that for a contract we need "a sufficient cause or consideration."[4] What is that? Section 28-2-801 provides:

> **What constitutes good consideration.** Any benefit conferred or agreed to be conferred upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by the person, other than prejudice that the person is at the time of consent lawfully bound to suffer, as an inducement to the

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J. Burnham & James C. Nelson, *Debating the Field Civil Code 105 Years Late*, 61 Mont. L. Rev. 371, 380 (2000).

4. MONT. CODE ANN. § 28-2-102(4) (2019).

promisor is a good consideration for a promise.[5]

This is a helpful definition of consideration, and we can unpack it with profit. But to really get a grip on it, we need some context. Cases like *Hamer v. Sidway*,[6] *Kirksey v. Kirksey*,[7] *Wood v. Lucy, Lady Duff-Gordon*,[8] and hypotheticals like "Williston's Tramp"[9] are staples of first-year law study for good reason—they give us the context to make the rule meaningful. After wrestling with such cases, I think U.S. law students get a pretty good sense of how to concoct and identify this mysterious glue that binds contracts together. In fact, didn't Mr. Field derive his rule by synthesizing cases? So, it would seem that study of the cases gives us both the rule and also a better understanding of the rule since we have seen its application in context.

Let's now go back to the rule we found in the Montana Code. Having acquired a working knowledge of consideration from the Code definition, we are only halfway to understanding that element of contract formation, for section 28-1-102 mentioned "cause" as an alternative to consideration. Where is its definition? Alas, it disappears from the Code after that initial mention. Curious about what it is, I found a law review article on the topic.[10] Tracking the long history of cause, Professor Keyes seems to define it as the absence of consideration. Curiously, in the more than 150 years since that statute was adopted in California, no attorney seems to have argued, "I may not have consideration for this contract, but I don't need it because according to the California Civil Code, I can have cause as an alternative." I'm not sure if the reason for this gap is because this

5. *Id*. at § 28-2-801 (derived from Field Civ. C. § 780).
6. Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).
7. Kirksey v. Kirksey, 8 Ala. 131 (1845).
8. Wood v. Lucy, Lady Duff-Gordon,118 N.E. 214 (N.Y. 1917); *see also* Scott J. Burnham, *Understated Elegance*: *Wood v. Lucy, Lady Duff-Gordon, in The Best and Worst of Contracts Decisions: An Anthology*, 45 FLA. ST. U. L. REV. 889, 907 (2018).
9. WILLISTON ON CONTRACTS § 7:18 (2018).
10. William Noel Keyes, *Cause and Consideration in California—A Re-Appraisal*, 47 CAL. L. REV. 74 (1959).

particular code has provided us with a red herring, or because Maxeiner is right that we denigrate codes as a source of law.

On many occasions I have been frustrated by the Montana Code as a source of law because I have seen how courts can manipulate it, often cherry-picking inapplicable statutes in order to reach a desired result. An egregious example is *Miller v. Fallon County*.[11] One of the issues in *Miller* was the enforceability of an exculpatory clause. This seems to me a difficult issue for a code to deal with, because enforceability depends on so many variables. A statute could easily outlaw exculpatory clauses for personal injury, as is the case in Louisiana, perhaps not coincidentally a civil law jurisdiction.[12] But that solution seems to go too far, for the common law sensibly says that exculpatory clauses have a place in private ordering where there is a negotiated contract in an area that lacks public interest.

In an excellent example of common law analysis, *Tunkl v. Board of Regents*,[13] the California Supreme Court determined that an exculpatory clause was not enforceable when entered into by a patient seeking hospital services. The court then laid down factors—though these work better as elements—for courts to examine in order to determine application of the rule in various contexts.[14] Using these factors, California courts later determined, for example, that an exculpatory clause was not enforceable in a residential lease but was enforceable in an agreement between a professional driver and a race track.[15] This seems to me an example of the common law at its best. I am not sure how a code could deal with these subtleties.

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11. Miller v. Fallon County, 721 P. 2d 342 (Mont. 1986).
12. LA. CIV. CODE ANN. art. 2004 (2018).
13. Tunkl v. Regents of the University of California, 383 P.2d 441 (Cal. 1963).
14. *See* Scott J. Burnham, *Are You Free to Contract Away Your Right to Bring a Negligence Claim?*, 89 CHI.-KENT L. REV. 379 (2014).
15. *See, e.g.*, Henrioulle v. Marin Ventures, Inc., 573 P.2d 465 (Cal. 1978); Nat'l & Int'l Brotherhood of Street Racers, Inc. v. Superior Court, 215 Cal. App. 3d 934 (1989).

Now the scene switches to Montana. In *Haynes v. County of Missoula*,[16] a case where the exculpatory clause was found in the entry form that an exhibitor signed when entering an exhibit in the Missoula County Fair, the Supreme Court of Montana first examined the Code provisions on illegality, and correctly found that a provision is not illegal unless it is contrary to the public interest. In order to determine the extent of public interest in this case, the Court looked at the test laid out in *Tunkl*, and determined that, while the case was close, there was sufficient public interest in a county fair that the exculpatory clause was not enforceable. One may disagree with the outcome, but it is hard to find fault with the analysis as an example of common law reasoning.

A few years later, in *Miller v. Fallon County*,[17] the same court was faced with the issue of the enforceability of an exculpatory clause that had been signed by the wife of a long-distance truck driver in order to secure permission from the trucking company to accompany her husband on his travels. I don't think there would be much doubt that application of the *Tunkl* test would lead to enforceability, so the Court, determined to find for the plaintiff, had to take a different route. It ignored the *Tunkl* test used as precedent in *Haynes*, and instead looked to the statutes on illegality. It found this one:

> **Contracts that violate policy of law—exemption from responsibility—exception.** Except as provided in 27-1-753, all contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.[18]

Well, the court reasoned, this statute says that it is illegal to put in a contract a provision that is contrary to law, so let us ask, what

16. Haynes v. County of Missoula, 517 P.2d 370 (Mont. 1973).
17. Miller, 721 P. 2d 342, *supra* note 11.
18. MONT. CODE ANN., *supra* note 4, at § 28-2-702 (derived from Field Civ. C. § 828).

is law? It includes tort law, which says we aren't supposed to commit torts without facing consequences. So, it must be illegal to put in a contract that one may commit a tort without consequence. Thus, the exculpatory clause is illegal—as are *all* exculpatory clauses. The appreciation for context, for different results in different situations, which characterized the common law analysis of the issue in *Tunkl*, is gone, replaced by the inflexible rule derived from a code. A common law court could have come to the same conclusion, but along the way to that conclusion it would have had to show us why it was against the public interest to allow the exculpatory clause in this context.

As another example of the difficulty of codifying a complex rule, the Montana court does not like the finality of worker's compensation settlements when the injuries turn out to have been greater than the parties thought they were at the time of settlement. Historically, one of the best tools to attack such a settlement is the doctrine of mutual mistake. In *Kienas v. Peterson*,[19] for example, the Court found the settlement voidable on grounds of mistake but conveniently omitted discussion of the issue of whether the claimant had assumed the risk of being mistaken.

In a later case, *Wolfe v. Webb*,[20] the Court had to face that issue, since the settlement contained clear language indicating that it would be binding even though the parties were mistaken about the extent of the injuries. The Court took a close look at the Code rule on mistake. Section 28-2-102 tells us that the parties have to consent to the contract, and section 28-2-301 tells us the consent has to be free.[21] Section 28-2-401 tells us that consent is not free when obtained through mistake.[22]

What is mistake? Section 28-2-409 tells us:

What constitutes mistake of fact. Mistake of fact is a

19. Kienas v. Peterson, 624 P.2d 1 (Mont. 1980).
20. Wolfe v. Webb, 824 P.2d 240 (Mont. 1992).
21. MONT. CODE ANN., *supra* note 4, at §§ 28-2-102(2), 28-2-301(1).
22. *Id.* at § 28-2-401(e).

> mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in:
> (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or
> (2) belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed.[23]

Where is the rule that a mistake has to be mutual or the rule that one can accept the risk of being mistaken? There are no such rules in Mr. Field's code! Therefore, when there is mistake, there is no consent, and when there is no consent, there is no contract. This analysis seems correct on the face of the Code, which leaves out an important element of mistake—assumption of the risk of being mistaken—that distinguishes it from the other defenses. And rather than read that omission into the Code, the court was content to use the omission when it served its purposes.

If the law is more accessible when found in the form of a code, these examples certainly don't demonstrate it. Maxeiner might argue that these problems are traceable to the way this Code is drafted, though he does not have a negative word to say about the Field Code. More likely, he would argue that the problem is traceable to the way it has been employed by users unfamiliar with a code system. To illustrate the advantage of a code system, in the second half of the book Maxeiner gives us a concrete comparison of two legal systems, the German and the American.

The book comes alive for a moment at the beginning of this comparative section when, to illustrate his point, he uses the hypothetical of a person who wishes to know the applicable law in order to drive a horse trailer across the country. In Germany, there is only one body of law to look to. In the United States, the laws are found in interstate commerce law as well as in the laws of various states and counties, much of it hard to find. Actually, the example may be even more complex than Maxeiner indicates, for our traveler would no doubt

23. *Id.* at § 28-2-409 (derived from Field Civ. C. § 762).

pass through Indian Country, and those jurisdictions have their own laws that may well differ from the law of the state in which the reservation is located.

This example lets us down, however, because most of the relevant law is regulatory—it is found in statutes rather than in the common law. The example, therefore, does not demonstrate the superiority of statutes to the common law; it demonstrates a weakness of American federalism. When each jurisdiction is permitted to have its own law, it can indeed be difficult to plan a multistate transaction.

But isn't this weakness of federalism also a strength? Why should the horse law of Montana, where horses are used recreationally and in ranch work, be the same as the horse law of Pennsylvania, where horse-drawn buggies are a common mode of transportation in some communities, or the same as the horse law of Kentucky, where horses are bred commercially?

Rather than furthering his argument that code law is superior to common law, Maxeiner's example instead launches a new argument—that much of U.S. statutory law is not code law at all, for the statutes lack the integrity found in a true code. The case of the U.S. Code being merely a dog's breakfast of assembled and sometimes contradictory statutes is the prime example. Again, I am convinced, and anyone would agree that where we do have codes, we should have workable codes.

Much of this section on codes is given over to a dry survey of the German code scheme, again with few examples. It appears that the vaunted German efficiency extends to their codes as well. Maxeiner tells us "In Germany finding governing laws is easy and unproblematic. Minutes, not days or hours, are required." I decided to test this proposition by seeing if I could find answers in the German code to the problems that puzzled me in my use of the Montana Code: 1) What is consideration—or more broadly, what is required for an enforceable contract? 2) Will a contract be avoided for mistake when a party has assumed the risk of being mistaken? 3) When will an exculpatory clause be enforced?

I had no trouble finding the German Civil Code (BGB).[24] Here is what I found during my inquiry:

1. Consideration. In my search for how the German code deals with consideration, I found that Title 3, Contract, Sections 145 et seq., jumps right into offer and acceptance but omits discussion of any other element of formation. I then did a word search for *consideration* and found that there are provisions that talk about consideration in a context very much like the U.S. conception of it. For example, Section 316 seems similar to U.S. law that provides for what to do when no price is stated in the contract.[25] It provides:

"**Specification of consideration.** If the extent of the consideration promised for an act of performance is not specified, then in case of doubt the party that is owed the consideration is entitled to make the specification."[26]

This provision assumes consideration, yet I see no earlier provision that goes to the heart of the question—which promises is our society going to enforce, and if it is going to enforce those that are supported by consideration, then what is consideration?

2. Mistake. It was easy to find the provision addressing mistake. Section 119 provides:

> **Voidability for mistake.** (1) A person who, when making a declaration of intent, was mistaken about its content or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case.[27]

Without more, I am not sure this section answers my question. Is a person "mistaken about its contents" when he enters a contract to settle a claim for injuries for $10,000 when his injuries in fact

24. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], *translation at* https://perma.cc/W4AJ-Y3MC (Ger.).
25. *See, e.g.*, U.C.C. § 2-305.
26. BGB § 316 (Ger.).
27. *Id.* at § 119.

amount to $100,000, but he does not know that at the time? And can he agree to accept the risk of being mistaken? If this section is merely a starting point for analysis, then it would seem we are in the same position we would be in if researching the question under a common law regime.

3. Exculpatory clause. It was also easy to find Section 309 on prohibited clauses:

> **Prohibited clauses without the possibility of evaluation.** Even to the extent that a deviation from the statutory provisions is permissible, the following are ineffective in standard business terms:
> 7. (Exclusion of liability for injury to life, body or health and in case of gross fault)
> a) (Injury to life, body or health) [A]ny exclusion or limitation of liability for damage from injury to life, body or health due to negligent breach of duty by the user or intentional or negligent breach of duty by a legal representative or a person used to perform an obligation of the user;
> b) (Gross fault) any exclusion or limitation of liability for other damage arising from a grossly negligent breach of duty by the user or from an intentional or grossly negligent breach of duty by a legal representative of the user or a person used to perform an obligation of the user . . . .[28]

This provision seems to answer our questions about the enforceability of an exculpatory clause. Section 305 defines "standard business terms" similarly to how U.S. law defines a contract of adhesion, so this provision, like the common law cases discussed earlier, distinguishes between an exculpatory clause in a contract of adhesion and in a negotiated contract. It prohibits the clause only in the former, leaving the implication that it would be enforceable in the latter. Similar to the U.S. cases, it appears to prohibit clauses that exculpate from gross negligence or intentional torts. In the area of simple negligence, it seems to prohibit all exculpatory clauses, without consideration of whether the activity is in the public interest. One can argue that that is an overly inclusive prohibition, but one cannot argue that it is not clear.

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28. *Id.* at § 309.

It is quite possible that my search for answers in the German code scheme reflects my own inadequacies rather than those of the code. However, my limited goal was to test Maxeiner's proposition that I could find the answers in minutes. My search results indicate that the German code may not be as simple to access as Maxeiner would have us believe.[29]

In conclusion, Maxeiner has convinced me that in the United States, we have long lived in an age of statutes. He has also convinced me that these statutes are not as well written or organized as some of the codes he admires, especially those of Germany. But he has not convincingly made the argument that I expected him to make—that codes are preferable to common law.

Coincidentally, I recently read another book that draws comparisons between U.S. law and German law—James Q. Whitman's *Hitler's American Model: The United States and the Making of Nazi Race Law* (2017) I was particularly struck by a short passage in Whitman's conclusion. I knew that Franklin D. Roosevelt felt stymied because he believed the national emergency of the depression demanded rapid change in the law that the Supreme Court would not permit. What I did not know was that Nazi jurists felt the same way about the national emergency in Germany. *If only we were not restricted by our codes*, they thought. *If only we had a common law system like that in the U.S. where the judges could make the law needed to meet the emergency*.[30] That insight caused me more apprehension about the common law than anything in Maxeiner's entire book.

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29. I am grateful for the assistance of Dlovan Schlato, a student at Gonzaga University School of Law and a graduate of Rheinische Friedrich-Wilhelms-Universität Bonn. Ms. Schlato advises me that one would never rely solely on the Code but would also consult the Commentary (*Kommentar*)—advice that Maxeiner did not provide.

30. *See* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 153–58 (Princeton U. Press 2017).

Review by Markus G. Puder

James Maxeiner's book makes a welcome contribution to the conversation about comparative law in the United States. It truly is a great read—not only because of its provocative contents but also because of its personal tone.

The thread of the book is clear from the outset. Functional societies are predicated on a government of laws. America's legal system is broken. Germany has a working legal system. Maxeiner organizes his storyline into a historical part, which establishes the American baseline, and a comparative part, which juxtaposes the American and the German experiences, including a creative case study. From the vast array of topics raised by Maxeiner, instructors could easily tier a complement of stand-alone modules for purposes of creating a full course in comparative law. Those interested might find the architecture of the book coupled with the wealth of references immensely helpful for such an endeavor.

Maxeiner's book, rich in themes deserving of dialogue, does not shrink from vigorous debate. You do not have to agree with the author in every instance. Ultimately, it is all about leaving the echo chamber that appears to increasingly parochialize our comparative law. For example, I was recently privy to a conversation between two practitioners about a legal transplant. When it came to the question of what the model actually said in the language of the donor system, one of the interlocutors asserted that "there are translations." But what if the translation is inaccurate? What might the client of that attorney say or do in such a case? As I have experienced in the context of my own bilingual (English-German) edition of the Louisiana Civil Code,[1] the comparative legal academy has become much narrower than it used to be when it comes to law and language. In a

1. MARKUS G. PUDER, DAS ZIVILGESETZBUCH VON LOUISIANA: ZWEISPRACHIGE ERSTAUSGABE MIT EINER EINLEITUNG (Nomos 2017).

similar vein, too many comparative law journals in the United States consider the dyad of legal translation and comparative law, or comparative law and legal translation, a topic too specific for their readership. In an increasingly smaller world, this posture seems peculiar at best.[2] During the plurilingual and plurijural days of Louisiana, our most illustrious jurists were masters of the art of bridging law and language.

Similarly, whether the common law system or the civil law system is "superior" is not the point—reasonable people may reasonably differ in their views. But the conversation about both systems must be had and it must continue. Comparative law is a living and breathing creature. In mixed jurisdictions we know this all too well. Take, for example, the Louisiana trust.[3] To this day, the literature and the jurisprudence offer different models of explication when it comes to reconciling the common law notions of formal and beneficial title with Louisiana's unitary conception of ownership. Moreover, Louisiana needed to mollify its rule of immediate vesting and remove the trust from the prohibition of substitutions. Arguably, Louisiana has managed to split the atom by offering a body of trust law that is fully functional within the American Union.

Another important theme raised by Maxeiner involves codified law and codifications. Again, there is much room for fruitful dialogue. Significantly, a code is not a code in the United States. From a Louisiana perspective, our code is "harder" than the codes more fully discussed by Maxeiner. The Louisiana Civil Code embodies the solemn expression of the legislature. While jurisprudence continues to fill and push the limits of the principles *féconds en conséquences*, courts are bound by the legislated law of the code. Especially in the wake of our civilian Renaissance, which took hold in the 1960s, Louisiana state courts and federal *Erie* courts have

2. Markus G. Puder, *Law and Language in Action—Transformative Experiences Associated with Translating the Louisiana Civil Code into German*, 84 RABELSZ (forthcoming 2020).

3. Markus G. Puder & Anton D. Rudokvas, *How Trust-Like Is Russia's Fiduciary Management? Answers from Louisiana*, 79 LA. L. REV. 1071 (2019).

stayed the course. Understandably though, courts are rightfully irked when the legislature in turn resorts to "fixing" specific judicial decisions deemed not true to a particular redactor's preferred reading of the law. In Louisiana, this occurred, for example, in the context of a controversy over Louisiana's law of fixtures ("attachments").[4] In contrast to the Louisiana Civil Code, California's Civil Code, meanwhile quite aged, offers a snapshot of the ambient common law of the time. Significantly, the code embraces the common law process and method of moving the law forward. Both features have encouraged the judiciary to be more assertive when it comes to abrogating and replacing codal law. For example, California's Supreme Court took it upon itself to replace by judicial fiat contributory with comparative negligence even in the face of the properly construed codal text.

Codes also differ in their style, transparency and readability. Germany's Civil Code is basically written for professional lawyers. It is replete with legalisms. Laypersons therefore face the basic challenge of understanding its legal terminology and drafting technique. In contrast, with its down-to-earth tone and accessible vocabulary, the Swiss Civil Code is probably the most user-friendly codification in the German law and language sphere. In Louisiana, the difference among the redactors taking ownership of portions of the document, as it continues to be revised in waves, has resulted in numerous stylistic and substantive fissures. Redactors have frequently brought their indigenous and disparate cultures of origin to bear. This makes the Louisiana Civil Code not only a challenging but also a voluminous document, even if core areas of private law, such as the Trust Code and the Children's Code, are housed elsewhere.

Finally, Maxeiner makes no bones about his preference for Germany's approach to a government of laws. Might this reflect his experience of learning from one of the revered teachers and scholars

4. MARKUS G. PUDER, JOHN A. LOVETT & EVELYN L. WILSON, LOUISIANA PROPERTY LAW (forthcoming 2020).

at the Ludwig-Maximilians University in Munich—the late Professor Wolfgang Fikentscher? In the context of the functionality of Germany's system, one more observation comes to mind. The arrival of the European Union, with its regulatory rage (*Regelungswut*) and governance paradigm of commandeering progressively expanding areas of competence, has dramatically altered trajectories towards a government of laws in Europe, including Germany. The debates about curvature of the cucumber (*Krümmung der Gurke*) has become the emblematic image for this proposition. Time for a sequel, Prof. Maxeiner? *Sis felix*!

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