REVIEWS

COMPARATIVE LAW: CASES—TEXT—MATERIALS (2d edition). By Rudolf B. Schlesinger. Brooklyn: Foundation Press, 1959. Pp. xliv, 635.

NINE years ago, the first edition of this book was greeted with much enthusiasm as the first venture of its kind in the field of comparative law. Some reviewers, however, regretted the book's all-too-"pragmatic" aim to "sell" its subject to the student,[1] as well as the exclusion of materials on public law.[2] Von Mehren's *Civil Law System*[3] avoided these criticisms—only to be subjected to the opposite reproach of being "too scholarly and not sufficiently pragmatic."[4] The difficulty seems to lie with the subject rather than with its treatment.

A coursebook in comparative law presents special problems. The scope, aims, and techniques of courses in this field, and particularly the backgrounds and interests of the instructors, vary so widely that some of us will prefer our own materials, however imperfect, to even the finest product of a colleague's scholarship. For example, it is my personal prejudice that, in our less than generous curriculum, a "fringe course" of this kind is more effective as a course in comparative *jurisprudence* rather than as one in foreign or comparative *law*. To be sure, the book under review offers ample material for such jurisprudential teaching.[5] Indeed, the kind of analysis which it makes of law-making by legislation, precedent, and doctrine is essential for any meaningful comparison of legal systems. But any instructor who wishes to use such comparison in a course on jurisprudence to avoid the perpetuation of that perennial misunderstanding between the "schools,"[6] will need much more philosophy in his search for the common denominator of all law. And even if he were to teach a course in comparative law proper, without jurisprudential byways and byproducts, he would miss a more ample basis than Schlesinger provides for exploring the history and present meaning of Roman law,[7] and, more important, for showing the dramatic need for reform of American procedural law,[8] and the supe-

1. See, *e.g.*, Friedmann, Book Review, 9 U. TORONTO L.J. 162 (1951); Stone, Book Review, 26 N.Y.U.L. REV. 239 (1951); Riesenfeld, Book Review, 3 J. LEGAL ED. 620 (1951). *But see* Fulda, Book Review, 36 CORNELL L.Q. 185 (1950).

2. See, *e.g.*, Friedmann, *supra* note 1; Fulda, *supra* note 1, at 187; Riesenfeld, *supra* note 1.

3. VON MEHREN, THE CIVIL LAW SYSTEM (1957).

4. Koessler, Book Review, 10 STAN. L. REV. 385 (1959).

5. See pp. 168-89, 287-391.

6. See Ehrenzweig, Book Review, 64 HARV. L. REV. 355 (1950).

7. Pp. 173, 186; see Ehrenzweig, *A Common Language of World Jurisprudence*, 12 U. CHI. L. REV. 285 (1945); Wolff, Book Review, 19 U. KAN. CITY L. REV. 124, 126 (1951).

8. See note 24 *infra*.

riority of the law-making processes of the common law.[9] But those many who are willing to seek and receive help from printed materials at the expense of their own favorites will gain most and lose least when using the book under review. That sixty per cent of Cornell law students choose the author's course, is compelling evidence of his excellence as a teacher. That many schools have adopted his book is conclusive proof of the excellence of the tool.

Here, indeed, is the book which most emphatically and convincingly reduces the central question of comparative law to its true historical and functional meaning: no better attempt has been made in this field to juxtapose the positions in the two great legal systems of bar and bench,[10] the relative periods of growth,[11] "the great dichotomies" (public and private law,[12] civil and commercial law[13]), and the relative weights of university tradition[14] and codification.[15]

The book concedes to comparative procedure a long deserved predominant position. In this all-important field, and perhaps in this field alone, American law, for compelling historical reasons, is nearly a century behind many of its foreign counterparts. This message, however, would have been even more effective were it not in part obscured, understandably but perhaps unnecessarily, by the author's pervasive endeavor to please his student.[16] In pursuit of this goal Schlesinger has gone far—I believe too far—in stressing the "practical" advantages of familiarity with foreign laws. The process of proving foreign law continues to be given undue space, and the case method, notwithstanding the author's own misgivings,[17] is generally adhered to, although it has little to

9. To be sure, the statement that "many scholars believe that, at least in theory, [the fact that civilians do not accord binding force to judicial precedent] . . . creates a gulf between civilian thinking and ours," p. 288, can easily be amplified by the instructor. But since few students are exposed to courses both in comparative law and jurisprudence, much of the author's fine analysis of the force of precedents in a code system, pp. 287-89, may lack perspective.

10. P. 179.

11. P. 181.

12. P. 183.

13. P. 184.

14. P. 186.

15. P. 188. Limitation to a few systems (French, German and Swiss) was inevitable. But this reviewer, like Koessler, *supra* note 4, at 389, must confess to a bias. He considers it unfortunate that both Schlesinger and von Mehren do not fully discuss the Austrian Code of 1811. Schlesinger's references, pp. 181, 265, hardly do justice to the fact that the Austrian Code is the only product of the era of natural law. Since this Code is still in effect, it cannot be said that "every civil law code system can be traced" to the French, German, or Swiss codes. P. xvii. (A correction appears at 265.) The discussion of Scandinavian laws, p. 196, fails to note that these laws range from the near-common law of Norway to the near-civil law of Denmark. Not many, on the other hand, will share Bodenheimer's regret at the exclusion of Russian law. Book Review, 3 STAN. L. REV. 755, 757 (1951).

16. See Rashba, Book Review, 51 COLUM. L. REV. 403, 404 (1951); Stone, *supra* note 1, at 241.

17. P. xix. It should be noted, however, that more than one half of the space in the second edition is devoted to text material. See p. xii.

commend itself in this field beyond the demonstration of differences in the structure and purpose of court opinions. The aim of "practicality" probably accounts for the choice of specific topics of substantive law.[18] While preferable to the comparative presentation of torts and contracts,[19] comparisons of the laws of agency and corporations,[20] at least in their almost uniform modern setting, are hardly significant enough to justify their use as the principal examples of the civil-law method.[21]

Perhaps the most outstanding feature of the second edition is the magnificent experiment of contrasting the two procedural systems in a "fictional dialogue concerning a not-too-fictional case," which on thirty-three compact pages [22] has Professor Comparavich expound the "essential elements of procedural institutions in modern civil law countries" to Messrs. Smooth and Edge, General and Assistant Counsel of the giant International Dulci-Cola Corporation. But even this masterpiece cannot be a substitute for the translation of a foreign transcript of record as a pedagogical tool.[23] And, in keeping with the author's perhaps all-too-conciliatory vein, it fails in one other respect vital to this reviewer. For, although some of the outstanding and clearly superior features of good modern civil-law procedure are mentioned,[24] the discussion centers around the

18. There might even be greater stress on those comparisons inviting reform, such as the strange fact that this most commercial country has not adopted foreign systems of land registration. P. 339. Schlesinger makes a fine analysis of "the principle of publicity in transactions not relating to land." P. 341.

19. *But see* Kahn-Freund, Book Review, 67 YALE L.J. 950, 952-53 (1958). See generally von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959); Keyes, *Cause and Consideration in California—A Re-Appraisal*, 47 CALIF. L. REV. 74 (1959).

20. Pp. 394-451.

21. In the treatment of Conflict of Laws, public policy v. ordre public and the role of the nationality principle, pp. 450-76, while important for a conflicts course, hardly reach the basic comparative issues and would require considerably more historical background than can be offered within this framework.

22. Pp. 201-34.

23. For several years I have found this the most valuable feature of my own course. American counsel associated with their civil-law colleagues in a moot court session based on this transcript have been encouraged to point out the violations of "due process" by the civil-law court.

24. See pp. 217, 239, 249, and particularly the "Note on procedural reform," pp. 250-52. In this context even greater emphasis might have been desirable on the civilian concept of competency as contrasted to "jurisdiction," pp. 209-14, the enormously important institution of extralitigious proceedings, p. 234 n.38; *cf.* EHRENZWEIG, CONFLICT OF LAWS 1 n.2, 272-93 (1959), the fundamental differences in the concept of res judicata, pp. 227, 314; *cf.* EHRENZWEIG, *op. cit. supra* at 224, the unique role of the civilian "protocol" as contrasted to the "record," p. 226, the rejection abroad of the coaching of witnesses, pp. 217, 224, the different meaning abroad, though certainly not lack, of cross-examination, pp. 224, 239, 339, and the working of civil-law procedure in the virtual absence of a law of evidence, p. 218. See generally Lenhoff, *The Law of Evidence—A Comparative Study Based Essentially on Austrian and New York Law*, 3 AM. J. COMP. L. 313 (1954). On the other hand, sources of flagrant miscarriage of justice in civil-law countries, such as the rendering of legal opinions on American law by private "institutes" which often lack sufficient training and

problems of the giant corporation. Unless the instructor can add a great deal from his own observations concerning every-day practice in civil law courts, this chapter will hardly convey that message which to this reviewer is perhaps the most essential one of all comparative law teaching in this country—that even in the most dictatorial country of the civil-law orbit, the "little man," in many ways, has had access to judge and justice more readily and more effectively than in this country which has perfected its procedure for commercial needs while relegating the righting of every day's wrongs to law-less and lawyer-less small claims courts and the charity of legal aid.[25] The young comparatist, as a future leader of the bar, must gain awareness of this crucial problem.

Schlesinger's book is a brilliant feat. It is as good as any one man's job can be on a subject which cannot be circumscribed in scope or aim, and for which the definitive teaching tool could be produced, if at all, only by a concerted effort of several schools and instructors of necessarily varying backgrounds and interests. To all schools and instructors in this country as well as abroad, however, this book will remain indispensable as a work of reference and inspiration.

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PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW. By Julius Cohen, Reginald A. H. Robson, and Alan Bates. New Brunswick: Rutgers University Press, 1958. Pp. xii, 301. $6.00.

IF the "moral sense of the community" is relevant to the lawmaking process, either as a norm for the lawmaker (both legislator and judge) to consider, or as one to follow, its determination need not be left wholly to conjecture or intuition. Modern social science techniques are reasonably adequate to ascertain this moral sense with regard to any given subject-matter that concerns the lawmaker. On this premise the three authors—one a law-man, the other two sociologists—base their study. Using legal and community attitudes regarding parental control over children as the specific subject-matter of their research, the authors demonstrate a sociological method for ascertaining community attitudes and norms for purposes of comparison with the statutes of one state. The jurisdiction is Nebraska, where the authors were living when they did their study; hence the statutes are those of Nebraska and the sample of people interviewed is representative of the adults of that state.

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knowledge, are noted with apparent approval. Pp. 225-26, 230. There are occasional, but perhaps inevitable, over-generalizations which may distort the reader's picture of the civilian process in general, as with regard to the appeal de novo, p. 229, the "examination of the parties," p. 219, and the oath, p. 220.

25. On the key problem of attorneys' fees, pp. 206, 350, 355, see Ehrenzweig, *Shall Counsel Fees Be Allowed*, 26 CAL. S.B.J. 107 (1951).

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The concrete questions answered by the study are: (1) To what extent is the law in the selected areas of child-parent relationships in agreement or at variance with the views of the community? (2) How homogeneous are the views of the community concerning the law? In other words, is there *a* moral sense of the community, or are there *many* moral senses? (3) What bearing do such socio-economic factors as age, income, sex, education, religion have on the views of people in the community concerning the law? (4) What reasons are given by those in the community for their views concerning the law? (5) To what extent do the findings of social science support the judgments of the community concerning the consequences of the adoption or rejection of specific legal norms?

The answers to these significant questions are discovered by an interview technique as rigorous and reliable as is known to social science today. The findings are of high intrinsic interest and value to both law-men and sociologists. The demonstration of the method of research—which is the authors' main purpose—deserves the serious attention of legislators, judges, and students. The senior author makes a brilliant philosophic and legal case for the further use of the method. He anticipates and—in the judgment of the reviewer—satisfactorily answers the objections of law-men against the method: (1) While every case is unique and must be decided on its individual circumstances, the judge can use a scientifically ascertained "moral sense of the community," rather than his own intuition, as a base line gauging the deviation of the individual case from the norm. (2) The cost of such a study is not prohibitive. This one cost only eleven thousand dollars, and the authors believe the figure could be reduced if future students benefit from their errors. (3) The questions posed during the interview were not too hypothetical; rather they were made quite specific.

Three criticisms of the study can be raised which the authors do not adequately answer. They did not ascertain the intensity of opinions given in response to their questions. The authors recognized this problem, but they believed they did not have sufficient funds to ask the additional questions that would have resolved the issue. A second objection is that people have definite opinions about some things, and vague and confused opinions about other things, and one cannot properly know the "sense of the community" unless one can distinguish among these. Tautologous answers, given when respondents were asked to cite the reasons for their opinions, might have provided a clue as to the proportion confused, but the authors did not exploit this possibility. A third objection is that answers to questions are taken literally, whereas most opinion research has shown that only relative or comparative judgments are reliable. The authors' dilemma, of course, was that their purpose required them to ascertain absolute or literal judgments, while there is no reliable research technique yet known for ascertaining absolute judgments. It is only fair to add that the authors make superb use of subsidiary questions, and this enhances credibility in the absolute proportions giving specific answers.

In the space of a short review, it is not possible to present more than a few of the many substantive conclusions of this study. The law does not value children as highly as people do, possibly because there is a lag in the law. The law fails to recognize age differences in deciding on the independence of children, but people certainly do. There are very few significant differences among people with differing socio-economic background—on sex, religion, age, education, income, occupation, number of children, urban-rural residence—on attitudes as to what should be the extent of parental authority, and most of the differences that did appear are quite small. No category in the population (using these eight criteria) were regularly closer to the existing law in their opinions than any other category. An illustration of the interesting findings derived from the probing of reasons for given opinions is that the public is less likely to support parental control over a child's earnings than over gifts to a child (although a clear majority are in favor of neither), whereas the law gives parents control of a child's earnings but not his gifts. The reasons for this community attitude appear to be that gifts might be large, whereas earnings are likely to be small, and people believe that a child should be protected, for his own future benefit, against squandering sizeable gifts.

Of the seventeen issues on parental authority studied, the public agreed with the law on only five, disagreed on ten, and was ambiguous on two. Thus, for this subject matter, the law is generally *not* in accord with the moral sense of the community. Three reasons are offered to explain this: "the differences in the impact of tradition upon law-makers and upon the community; the relative lack of pressures exerted upon law-makers to signal the need for change; and the inadequacy of prevailing techniques utilized by law-makers for ascertaining the moral sense of the community."[1]

In this otherwise careful, scholarly, thoughtful study there is one bit of incompleteness which this reviewer may be permitted to point out. The introductory, and especially the concluding, chapters convey the impression that the *method* of ascertaining the moral sense of the community used here—an opinion survey—is an innovation. But the authors fail to cite an earlier study by this reviewer[2] which did exactly the same thing (with perhaps a slightly better technique, although admittedly an inadequate sample). In fact, my earlier study arrived at a conclusion which is identical with a major one of this study, although the subject matter of the research was different—namely, that the community may value children more highly than does the law.

Notwithstanding the fact that this study is not wholly novel, it has such a high degree of intrinsic merit that it deserves the close attention of law-men and sociologists. For sociologists, the study provides a superb addition to knowledge concerning the values of a community and the correlations of these values to socially significant categories of the population. For law-men, the justification for the study—both in philosophic and practical terms—is best

1. P. 195.

2. Rose & Prell, *Does the Punishment Fit the Crime? A Study in Social Valuation*, 61 AM. J. SOCIOLOGY 247 (1955).

made by the senior author in the book's first chapter. I can only provide a brief summary of his argument, and urge a careful reading of the full book.

Whenever the legislator or judge arrives at a decision as to what is to be done about a given problem or conflict, he has some conception of the prevailing notions of right and wrong to guide him. Existing statutes and judicial precedents are usually not specific enough or relevant enough to compel his decision without reference to additional standards. Assuming that he does not cynically choose his value-premises arbitrarily, or in terms of his purely personal interests, he is obliged to think in terms of community values—whether these be current norms or ideals for the future. At present, he guesses regarding these values. If he is a perceptive and intellectually honest person, his guesses are probably good ones in so far as he is acquainted with the various populations that make up the community. But in our heterogeneous society, no man can be sufficiently familiar with the range of subcultural variations to be found in an American jurisdiction. To overcome these limitations on experience, not to speak of any inadequacies in personal sensitivity, the legislator and judge need some systematic means of ascertaining the relevant moral judgments that are to be found in the community. Empirical social research can provide such a means. Allusions to the community's moral sense are commonplace in legislatures and courts, but seldom, if ever, is there a reasonable specification given as to how one discovers this. Even if the judge or legislator deems it desirable to ignore the current, perhaps debased, moral sense of a given segment of the community, he ought to make sure he really knows what that moral sense is, and not rely on intuition or stereotypes. He can then reasonably arrive at a decision which will have the best chance of effectuating his idea of justice.

Cohen does a splendid job of answering the stated and potential objections of the law-men, and of making a positive case for the research, and, with minor exceptions, Robson and Bates do a splendid job of executing and presenting a useful example of sociological research.

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