

2005

Tributes to Professor Edward Tomlinson

Olivier Moreteau

Louisiana State University Law Center, olivier.moreteau@law.lsu.edu

Follow this and additional works at: https://digitalcommons.law.lsu.edu/faculty_scholarship



Part of the Law Commons

Repository Citation

Moreteau, Olivier, "Tributes to Professor Edward Tomlinson" (2005). *Journal Articles*. 325.
https://digitalcommons.law.lsu.edu/faculty_scholarship/325

This Article is brought to you for free and open access by the Faculty Scholarship at LSU Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

I was pleased to find another man on the faculty whose eyes glazed over when, as it inevitably would, the talk in the faculty study turned to quarterbacks or pitchers, depending on the season (though I did not go quite so far as Ted in lobbying for the cancellation, in perpetuity, of opening day of the baseball season). Like most of us, Ted had his blindspots, and they tended to involve popular culture. I'm not sure whether it's true, but it would be in character, for him to have remarked about Paris Hilton that he and Betsy preferred to stay in smaller places. On the other hand, when it came to those aspects of culture that exert a more civilizing effect on us, Ted could hold his own with the best of us.

Ted rarely missed a faculty workshop or paper presentation. And, rumor to the contrary notwithstanding, he was there for more than the free cookies (though he made sure to get his share of those as well). He was—and I trust will continue to be—an active and spirited participant in the intellectual life of the law school, where, despite his nominal retirement, he will remain an active presence for what all of us hope will be many more productive years.

OLIVIER P. MORÉTEAU*

I had the immense privilege to meet Professor Tomlinson in person before reading his vast contribution promoting the knowledge of French law to the American public. He was invited to teach in Lyon by a dear friend of his, the late and beloved Professor Jean-Pierre Lasale, then Director of the Edouard Lambert Institute of Comparative Law at Université Jean Moulin and promoter of the knowledge of American law in France. This was in Fall 1989 at a time when I was completing my comparative law Ph.D. dissertation on estoppel and protection of reliance.⁵ In my capacity as then Associate Director of the Institute (I later became Director), I organized Ted's visit and teaching schedule and rallied a substantial number of students. They found the course very challenging and most stimulating. On my request, Ted taught in English. However, students felt comfortable, knowing they could dialogue with him in French, especially after class. I will never forget the rich and fascinating conversations we had during our tête-à-têtes in some traditional Lyon restaurants. Ted visited

* Professor of Law, Russell B. Long Eminent Scholars Academic Chair, Director, Center of Civil Law Studies, Louisiana State University, Paul M. Hebert Law Center.

5. I revisited this topic in Olivier P. Moréteau, *Revisiting the Grey Zone Between Contract and Tort: The Role of Estoppel and Reliance*, in *EUROPEAN TORT LAW 2004*, at 60 (Helmut Koziol & Barbara C. Steininger eds., 2005).

again in Fall 1998 at a time where I had established a regular course on American Law, taught every year by three or four distinguished visiting professors.

Ted's visits were very special. Not only did we welcome a first-class American law professor but also a very talented comparatist, whose knowledge of the French system was second to none. His translation of the French Penal Code of 1994⁶ goes far beyond what is often regarded as modest translation work. It shows a great care for the terminology. In the "Translator's Preface," he explains that some French terms may not be translated by the use of corresponding terms in the American vocabulary because it would create confusion with rules or institutions that may be very different. He kept, for instance, the word "violence" rather than using the term "assault and battery." On the other hand, Ted avoids literal translation where it would make the reading and understanding difficult. He strikes the right balance and deals with the text with modesty, making the reader feel like he or she is reading the original. The introduction is a great piece of comparative scholarship. Like in other articles dealing with French criminal law and procedure,⁷ he writes with the intimate knowledge of an insider, combined with the intellectual distance of an outsider, developing overall views of criminal justice systems as well as the technical rules and institutions they are made of. He perfectly understands how the French system works, with open-ended definitions and loose rules, leaving much room to judicial discretion and activism and yet with a formalistic description by French scholars of what the law is. It takes an intimate knowledge of the French culture and language as well as a great mastery of the comparative method to decipher the legal language of a different country and give such a clear and accurate presentation of what the reality is, beyond the loose words of French codes and statutes, the extremely short holdings of French judges, and the very formal comments of French scholars. Ted does this with immense clarity and modesty.

He concludes one of his essays writing that "[p]erhaps the best justification for studying the French system is that it gives us a perspective from which to appreciate the strengths of our own system,"⁸ rec-

6. 31 AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE OF 1994 (Edward A. Tomlinson trans., 1999).

7. E.g., Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983) [hereinafter *Nonadversarial Justice*]; Edward A. Tomlinson, *The Saga of Wiretapping in France: What It Tells Us About the French Criminal Justice System*, 53 LA. L. REV. 1091 (1993).

8. Tomlinson, *Nonadversarial Justice*, *supra* note 7, at 195.

ognizing also that this does apply to weaknesses as well. This is certainly one of the great advantages of comparative law, but his contribution shows that it is also the best way to step back and rethink legal problems, using different and sometimes uncommon perspectives. I particularly like Ted's more recent article on the duty to rescue where his approach encompasses both tort and criminal law. He recommends very wise solutions and points out the universal problem common to all legal systems: it is not so much the legal techniques we use that matter; rather, it is the art of drawing the line and doing it right.⁹

He also leaves us a superb article, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*,¹⁰ which I have recommended for years to my Boston University students for my Introduction to Civil Law course. While rightly focusing on the remarkable contribution of the judiciary, he shows how much French law is the product of the interaction of legislators, judges, and also law professors, the latter having a great influence in shaping the system. His study of the French saga on certainty of price in contract law¹¹ shows that judicial lawmaking is widespread in France and not limited to the interpretation of the five short articles dealing with torts in the Civil Code; it is everywhere. In another article dealing with contract law, written during his first visit to Lyon, he shows that in the common law and the civil law, "the predominant lawmaking role in both systems has been shared by judges and scholars," a rather nuanced view that most comparatists share.¹²

After many years of teaching the English common law and comparative law in Lyon, developing international programs and comparative research at the Edouard Lambert Institute of Comparative Law, the author of this tribute has moved to Louisiana, a mixed jurisdiction. My new students who engage in bi-jural education will find great and clear guidance in reading Professor Tomlinson's work. He has set a model for the development of comparative scholarship that I will not forget in developing the syllabus of the Center of Civil Law Studies at Louisiana State University. His open, culture- and history-sensitive

9. Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 451 (2000).

10. Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 LA. L. REV. 1299 (1988).

11. Edward A. Tomlinson, *Judicial Lawmaking in a Code Jurisdiction: A French Saga on Certainty of Price in Contract Law*, 58 LA. L. REV. 101 (1997).

12. Edward A. Tomlinson, *Performance Obligations of the Aggrieved Contractant: The French Experience*, 12 LOY. L.A. INT'L & COMP. L.J. 139, 213 (1989).

approach is the one that matters most in our contemporary multicultural global environment.

TERESA K. LAMASTER*

One ordinary day well into our first semester Legal Method—Contracts class, Professor Tomlinson called on me. I have forgotten the case and the question, but I remember answering something along the lines of “well, you could make the argument that the plaintiff was entitled to damages.” “Yes, ah well, I see, yes,” replied Tomlinson, “why don’t you?” Of course, right then I knew I hadn’t answered the question at all. And in that ordinary moment, I learned in a way that stuck the difference between drawing a conclusion and making an argument.

Not flashy or flamboyant, Ted’s teaching is excellent in just this way. He is a careful teacher, puzzling through questions deftly, methodically, gently, rather relentlessly, pushing students a step deeper into our own thinking. He is a consummately respectful teacher, not merely on account of the grace and civility with which he addresses his students, but more importantly because of what he believes us capable of. Like all masters of the Socratic method, his questions bear clear confidence in what students can learn, know, and understand.

Ted is a careful writing critic, as well, trying to teach several generations of lawyers to express ourselves simply, precisely, and efficiently on the page. His respect and care is evident here, too. Ted returns papers covered in red ink, with telltale Tomlinson idioms identifying two persistent bad habits: “nothing burgers,” those sentences law students (and others!) use to try to sound important, but that do nothing to advance the project at hand, and “my day in the library prose,” those sentences you cannot let go of, only because they were so hard to write in the first place, about all the positions you researched and found wanting. He is a teacher who sits at your elbow asking why you made the choices in your writing that you did and how they could be better. This strategy is painful to those of us hoping for ready answers and easy formulae on what makes good writing. But Ted’s teaching demonstrates a steadfast commitment to having students work it out for ourselves and to helping develop the habits of mind to keep us learning throughout careers as lawyers.

Now that I count Ted among my colleagues, I have learned much more about all he has given to this school, to the academy, and to this

* Assistant Dean, University of Maryland School of Law.