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Tributes

TRIBUTES TO PROFESSOR EDWARD TOMLINSON

KAREN ROTHENBERG*

Ted Tomlinson has served the School of Law as a dedicated teacher, innovative administrator, outstanding scholar, and sometimes even as its conscience for the last forty years. He is one of the most widely respected and well-liked members of our faculty and I am proud to have known and worked with Ted over the years. Even though he has officially “retired,” he will remain an important role model in our law school community as an Emeritus Professor.

Professor Tomlinson graduated from Princeton in 1961, earned his M.A. from the University of Washington in 1962, and earned his law degree from Harvard in 1965. He joined the University of Maryland School of Law faculty in 1965 and was promoted to Professor of Law in 1971.

Professor Tomlinson has taught a variety of courses, both in the core curriculum (contracts and criminal procedure) as well as advanced seminars in comparative law and the civil-law tradition. He has served tirelessly as a teacher of legal analysis and writing. Many generations of students have lined up in the hall as he carefully parsed their writing, teaching them not just to construct a sentence but to reason more clearly. He has also taught a Legal Theory and Practice course, working with students on the representation of criminal defendants in one of the most innovative courses of that type to be offered at the School of Law.

* Dean and Marjorie Cook Professor of Law, University of Maryland School of Law.

Professor Tomlinson is a nationally known scholar in three areas: administrative law, French comparative law, and criminal procedure (including the death penalty). He is the author of a score of articles, and he translated the French Penal Code of 1994, providing it with a scholarly introduction.¹ He has written large sections of major commission reports and a section of the *Maryland Trial Judges' Benchbook*.² His articles have been cited in the work of the American Law Institute for their informative comparative analysis. In short, he has been one of the most productive scholars at the law school.

Finally, but by no means least, Professor Tomlinson's service to the school and to the larger community is extraordinary. He has been the Chairman of the Curriculum Committee for decades, guiding several thorough analyses of our educational program. He has been a member of a variety of state committees and commissions, including service on the Governor's Death Penalty Advisory Committee. On the national level, Ted has been a director of the American Society of Comparative Law; and, internationally, he is the American Correspondent of the Association Henri Capitant des Amis de la Culture Juridique Française.

Throughout all of his efforts Ted, has never lost his enthusiasm for the law and his law school. Even though Ted is now "officially retired" we know that in his emeritus status, he will continue to provide gentle counsel and a guiding presence.

TOMLINSON'S GRAPEFRUIT OR DOGGEREL FOR A PUREBRED

DAVID BOGEN* & ALAN D. HORNSTEIN**

It is time to honor: Mr. T,
Curriculum authority.

There's no one so devoted
To his vocation's call—

He'd rather toss our President
Than opening day's first ball.

1. 31 AMERICAN SERIES OF FOREIGN PENAL CODES: THE FRENCH PENAL CODE OF 1994 (Edward A. Tomlinson trans., 1999).

2. MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, INC., MARYLAND TRIAL JUDGES' BENCHBOOK (1999).

* T. Carroll Brown Scholar and Professor of Law, University of Maryland School of Law.

** Professor Emeritus of Law, University of Maryland School of Law; Distinguished Visiting Professor of Law, Touro Law Center.

At every function or event,
As long as it was free,
Wherever food was served, he went,
The charming E.A.T.

Cookies were his favorite food, but not the only one;
He'd chew erasers, even pens, until the job was done.
And if a cookie crumb remained, whether nut or chocolate chip,
He'd race across a crowded room to snare it—as a tip.

What needs we had to teach a course—
Crim. Pro. or Admin. Law,
Contracts, Torts, a tour-de-force!
His breadth inspired awe.

Each sentence he uncovered,
LAWR 1 or seminar,
With pencil poised, he hovered,
To make of it a star.

His bearing often ramrod stiff,
In tan and navy blue,
He was the captain of a skiff
With students as the crew.

He led them cross the raging sea
Of ignorance and dread
To analytic mastery
In the hands of Captain Ted.

To foreign ports and foreign shores
He often led them on,
For, with Betsy, his amours
Are Paris and Lyons.

Translator penological
In English from the French,
His *mot juste* pedagogical
Enlightened all the bench.

His service to this school is great;
Committee work is done
With careful thought, and never late,
Our Edward Tomlinson.

And now it's time for au revoir
To dear Professor Ted,
But not good-bye; he'll not go far,
Or we'd be filled with dread.

Retired is as retired does,
So he'll be back in class.
He's still as good as ever was;
On that we'd bet our ass-ets.

GARY E. BAIR*

Unlike most, if not all, of the other tributes to Ted Tomlinson, this one does not come from a former student or colleague. Indeed, I am connected to the University of Maryland School of Law only by acquaintances with many of its fine faculty. By way of full disclosure, I must admit that I attended one Washington-area law school, and I teach on the adjunct faculty at another D.C. institution as well as at Baltimore's other law school.

No, my connection with Ted dates back to the end of 1992, in a context quite outside the halls of academe. William Donald Schaefer signed Executive Order 01.01.1992.28 on December 14, 1992, creating the Governor's Commission on the Death Penalty to conduct the first comprehensive review of the administration of capital punishment in Maryland. When I was appointed Chair of the Commission, I knew that I wanted and desperately needed someone with a unique skills set. The position to be filled was called "faculty reporter," but, in reality, I wanted an ex officio eighth Commission member who had command of death penalty, post-conviction, and federal habeas corpus law. There was only one person in the entire state who fit the bill: Ted Tomlinson.

The Commission had a lot to do and little time to do it. We were charged with the task of assessing whether it was possible to reduce the time it took for the appeals process to exhaust itself (and the victims' families) while at the same time maintaining procedural fairness to the defendant. Recall that Maryland had reenacted its death penalty statute in 1978, that fifty-six death sentences had been issued, and that fourteen inmates were on death row as 1992 drew to a close. Yet no one had been executed since 1961. The Commission was also

* Partner, Bennett & Bair, LLP; Adjunct Professor, American University Washington College of Law & University of Baltimore School of Law; J.D., Georgetown University Law Center, 1976.

tasked with “demystifying” the appeals process so that state officials and the general public could better understand the process. A tall order indeed, with less than a year to complete the study and issue the report.

At the time, I was Chief of the Criminal Appeals Division of the Office of the Attorney General and had handled capital cases on appeal and federal habeas corpus for the state. I had also represented a defendant at trial in a capital case during my early public defender days. Other members of the Commission brought the viewpoint of the defense, the trial prosecution, a victim’s family member, the legislature, and the general public. But we needed an intellectual, academic person who could take the mass of data we were collecting at public hearings and put that material into a cohesive report. As a Commission, we also wanted to make findings and recommendations relating to the administration of the death penalty in Maryland.

Ted far surpassed my wildest expectations. In less than a year, he authored what has become the definitive work on the death penalty in Maryland. We began our work in January 1993, and Ted produced a 264-page final report (exclusive of appendices) complete with 495 footnotes by November of that year.³ This report details the history of the death penalty in the state, how it works in practice, how the statute was administered from 1978 to 1993, how it compares with other states’ laws, and how to deal with costs and delays. After its publication, I was inundated with requests for copies, both from within Maryland and around the country.

Perhaps more importantly, Ted drafted the thirteen findings and nineteen recommendations of the Commission. Many of these later became part of the law of this state through changes in the Rules of Procedure as well as the death penalty statute. These findings and recommendations also addressed many issues, including racial and geographical disparities in the death penalty process, which to this day are being examined by the public and the courts.

Others have and will continue to examine the death penalty, both in Maryland and elsewhere. But none will bring the depth of knowledge or leave the legacy that Ted Tomlinson did in 1993. Ted not only influenced generations of law students through his four decades at the University of Maryland School of Law, he helped to shape the death penalty law in Maryland for all time. For that contribution, all of the citizens of Maryland should be grateful.

3. GOVERNOR’S COMM’N ON THE DEATH PENALTY, AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND: 1978-1993 (1993).

ALAN D. HORNSTEIN*

What can one say about a colleague who regularly takes on what may be the most thankless job in legal education. Year after year, interrupted only by the occasional sabbatical, Ted Tomlinson assumed the responsibility of leading the School of Law through some of its most contentious projects. As chair of the law school's active (some might say too active) Curriculum Committee, Tomlinson successfully shepherded through the faculty any number of major reforms, which, taken collectively, made the University of Maryland School of Law one of the most advanced institutions of legal education in the nation.

To be able to gore so many faculty oxen while retaining the respect, good will, and affection of his colleagues is no mean achievement. Law professors, after all, are not known for their intellectual humility⁴ or the grace with which they accept change they may regard as ill-advised, especially if their own particular corner of the curriculum is seen as threatened. What accounts for Ted's remarkable successes in these reform efforts? Perhaps most important, is the widely shared agreement that his leadership is driven by neither self-interest nor ideology, but with a sincere appreciation of what will best educate today's student for tomorrow's pursuit of justice.

He was always among the first to participate in operationalizing the vision he helped the rest of us to see. So, for example, following each reconfiguration of our required Legal Method/Legal Writing/Legal Analysis program over several decades, Ted taught the course almost every year. And he did so cheerfully, forging strong relationships with students in a course that many faculty are reluctant to teach because of the time and energy required to do so successfully and because it is sometimes regarded as *infra dig* for "real" professors. Similarly, although sometimes thought of as a pedagogical traditionalist, Ted eagerly participated in Maryland's Legal Theory and Practice program, offering a clinical seminar on the death penalty, which combined a searching inquiry in legal theory with work on real death penalty cases.

Long before "globalization" became a buzz word in legal education, Ted understood the importance of introducing American students and scholars to the ideas and conceptions of other legal systems. As an early champion of comparative law, Ted regularly taught and produced first-rate scholarship on the French legal system. His *affaire*

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4. As my Uncle Zoltan would say, "Sometimes wrong, never uncertain."

de couer with things French (his lovely wife, Betsy, teaches French) has been a boon to those of his colleagues who, having occasion to travel to that country, were able to tap a ready and reliable source of information on the best (and best value) in hotels, restaurants, and museums. Among the pleasures his retirement from full-time teaching and committee work will afford is the opportunity to spend more time reading French literature—in French, of course.

Apart from all of his many and varied contributions to the life of the law school, Ted may be best remembered as an exemplar of institutional citizenship. At a time of increased faculty mobility, it is perhaps to be expected that young law professors will feel a greater commitment to their scholarly specialty than to their institution; it is equally likely that they will be jealous of time spent on institutional projects rather than on the “fancy scholarship” that is the coin of the realm for upward mobility in the legal academy. This development is not to be sneered at; often it results in more scholarship pushing the envelope of legal knowledge and understanding. But it is not without cost, for it diminishes the sense of institutional culture and institutional loyalty on which excellence in part depends.

In such a world, Ted Tomlinson’s commitment to the University of Maryland School of Law is the gold standard. Over the course of his career at Maryland, in addition to his leadership of the Curriculum Committee, Ted served as chair of the Promotions & Tenure Committee; he was a member of various self-study and strategic planning committees; he was coach to Maryland’s National Moot Court Team; he was an important participant in every important issue to come before the faculty for over three decades.

All of this was in addition to his taking on more than his fair share of teaching hours and much more than his share of the most time consuming teaching assignments—supervising students’ writing. And, of course, Ted was producing a steady stream of important scholarship and engaging in public service beyond the walls of the School of Law, the most prominent of which was his work at the Patuxent Institution.

Now, these are the qualities and achievements of a superb law professor, but they leave out the more ineffable qualities that are most associated with Ted Tomlinson, the qualities that are displayed in professional and informal interactions with others, whether students or colleagues, in the classroom, the meeting room or the faculty study. It was in those venues that Ted demonstrated the more endearing—not to say idiosyncratic—qualities that defined him as an individual.

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 Lassale, 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

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community. From his service on the Curriculum Committee to his scholarship in comparative law, to his work on the death penalty, his contributions far exceed that narrow slice of his career I knew as his student. I am most grateful, however, for just that careful, respectful, narrow slice. Ted helped me, and many, many, many others like me, to become better writers, better thinkers, and better lawyers. And that is no nothing burger.