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Why We Read the *International Lawyer* - Answers Parsed from Works of Two International Lawyers

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Why We Read *The International Lawyer* – Answers Parsed from Works of Two International Lawyers

PATRICK DEL DUCA*

The International Lawyer's penetrating, permeating, multi-faceted, multi-cultural, cross-boundary, cross-disciplinary, and global treatment of the many dimensions of international law fascinates me, and no publication over the last fifty years has so consistently engaged practicing lawyers in creating that fascination. Nowhere else does such a diverse assortment of practitioners of international law of all kinds lay out the issues that they address in perspectives keenly grounded in both practice and theory. The contributors to *The International Lawyer* and its readers share an appreciation not only of the importance of the rule of law, but also an appreciation of how an understanding of the law in multiple contexts and of how the law bridges those contexts can advance the law and the interests of those subject to it, as well as the careers of those who seek to practice it.

We, the readers of, and contributors to, *The International Lawyer* are restless souls, ever seeking fresh perspectives on the challenges that we confront in our professional lives, motivated not only by immediate client needs, but also by a sense that the law is a global endeavor, fundamental to human achievement. Of course, we are lawyers and hence not timid in claiming that our chosen profession offers, perhaps even uniquely, the tools to resolve the truly important problems, much as economists, political scientists, philosophers, and theologians might likewise argue that their respective professions afford.

I. Two International Lawyers

As illustrations of shared motivations of our community focused on the American Bar Association Section of International Law and its flagship law review—*The International Lawyer*—here I focus on the work of two international lawyers, both of whom, deeply believing in the contribution of the tools of law, have been willing to undertake what might broadly and loftily be characterized as wrestling with the challenges of world peace and global prosperity.

These lawyers are my father, Louis Del Duca—deceased November 2015—and Boris Kozolchyk, actively guiding the National Law Center for

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Inter-American Free Trade.¹ Louis, born 1926, and Boris, born 1934, each illustrate a lifetime of passion for the law and for probing in comparative and international contexts not only how the law works, but also how and why it can work better.

To illustrate the profundity of their motivations and ambitions, I have selected one work of each. Concerning Professor Del Duca, it is what I believe to be one of his first legal works published, an essay written and published in Italian in 1953 to challenge Italian preconceptions of American legal philosophy. Concerning Professor Kozolchyk, it is a recent textbook that I hesitate to label career capping, because his career to date implies that he is far from done with legal trailblazing. Nonetheless, it is a seasoned lawyer's work, reflecting decades of experience in its subject matter. Notwithstanding the two works' elaboration at opposite poles of progression of legal careers, both illustrate the zest and the motivations that prompt us all to be part of the community that reads and writes *The International Lawyer*.

My allusion to the motivation of each as seeking "world peace and global prosperity" is not the banality of world peace trivialized as a pageant contestant's stock response in the "personal questions" phase of competition to subvert those who would be challenged by signs of intellectual effervescence. Rather, it is world peace in the sense that the "Greatest Generation" who fought the last world war understood in a personal way. It is world peace conceived as an antithesis to the moral and material privations that each of these two international lawyers experienced in their and their families' contacts with dictatorships, World War II, Cold War conflicts, reverberations of colonialism, and their associated injuries to human dignity.

In a sometimes-confusing world of Brexit, post-Cold War ambiguity, politicians focused on walls rather than bridges, and lone wolf terrorists, the relevance of world peace and law to each other and that relevance as a motivator of legal careers might appear remote. The works of the two international lawyers here referenced, however, show this motivation to be real, tangible, and universal in that it has driven their careers as sophisticated practitioners of commercial law, both of whom in addition to practicing law in the conventional sense of assisting clients, have also motivated generations of law students from around the globe and actively contributed to law reform in numerous countries, including the United States. How does the building of a career as a practitioner of commercial law fit within the umbrella of pursuing world peace? For these practitioners the links between well-functioning commercial law and the prospects of peace and prosperity are as self-evident as they were to Adenauer, De Gasperi, Monnet, Schuman, and others who labored to re-stitch the fabric of Europe in the launch of what has become the European Union.

Each of the two international lawyers whose work is here in focus left his country of birth, respectively Italy and Cuba, as those countries wrestled

1. NAT'L L. CTR. FOR INTER-AM. TRADE, <http://natlaw.com> (last visited Oct. 14, 2016).

with authoritarian regimes disrespectful of democracy, constitutional law, and the rule of law. Both advanced their education in the United States, but each benefited from advanced legal training, respectively in Italy and Cuba. Throughout their careers as practicing lawyers, legal academics, teachers, and law reformers, they shared a passion for commercial and financial law and for its expression through multiple legal systems. Although both became experts in all things pertinent to the Uniform Commercial Code, they each chose to complement that expertise with attention to other bodies of law of various jurisdictions and communities.

II. Observations on Philosophy of Law in the United States

Although Professor Del Duca declared in recent years to have lost count of his books and articles,² his first publication of which I am aware is *Osservazioni sulla Filosofia del diritto negli Stati Uniti* (Observations on Philosophy of Law in the United States), published in 1953 in the *Rivista Internazionale di Filosofia del Diritto* (*International Journal of Philosophy of the Law*).³ Then a recent Harvard Law School graduate and having completed two years in Rome on a Fulbright Fellowship, he wrote not in his primary language, English, but rather in Italian. He opens by defining as his task to examine the proposition that American legal philosophy reflects merely the utilitarian, positive, and pragmatic approaches of, respectively, Jeremy Bentham, John Austin, and William James.⁴ He concludes that the proposition is mistaken, having reviewed expressions of legal philosophy across the mosaic of U.S. history, culture, and intellectual environment, finding that natural law philosophy has deeply contributed to U.S. legal institutions and suggesting such philosophy's contribution to U.S. views relative to international law.⁵

The review starts with attention to the role of natural law in the initial thirteen American states, noting the Declaration of Independence and the United States Constitution as embraces of natural law.⁶ As an example, he cites the Declaration of Independence's proclamation as self-evident truths: "that all men are created equal, that they are endowed by their Creator with

2. Mark W. Podvia, Dedication, *Louis F. Del Duca, Edward N. Polisher Distinguished Faculty Scholar*, 117 PENN ST. L. REV. 1337 (2013). See also Robert E. Rains, *Luigi Del Duca: Sempre Più Giovane*, 87 PA. B.A. Q. 4 (2016).

3. Louis F. Del Duca, *Osservazioni sulla Filosofia del diritto negli Stati Uniti*, 30 (IV) RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 487-509 (1953). (RIDF) 487 (1953) (It.). The journal, founded by Prof. Giorgio del Vecchio (known among other things, in addition to his widely-read neo-Kantian work as a philosopher, for his initial adherence to Fascism, his having lost before World War II his professorship on grounds that he was Jewish, and his overcoming post-war prosecution as a fascist sympathizer), continues to publish.

4. *Id.* at 487.

5. *Id.* at 508-09.

6. *Id.* at 488.

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certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁷

On the basis of these self-evident truths, he notes that a legal system is established to guarantee such rights, implying a limited role for government.⁸ He contrasts Newtonian notions of physics and astronomy with platonic concepts of deduction of natural law through examination of moral ideals, but noting that both imply the governance of nature by immutable and eternal laws and as such, jointly lay intellectual foundation for the notion of the inalienability of the rights articulated in the Bill of Rights and the due process clause of the Fourteenth Amendment.⁹ Although acknowledging the *Commentaries* of Kent and Story as practical efforts to adapt the norms of the common law of England to the realities of geographic and economic expansion in the United States,¹⁰ he offers an explanation of *Marbury v. Madison*'s¹¹ assertion of the power of judicial review of constitutionality as an affirmation of the faith of the Constitution's drafters in their ability to incorporate principles of natural law in a text capable of equitably governing the nation's affairs.¹²

Professor Del Duca notes Roscoe Pound's identification of the progress in the science of law as the change from a merely analytical to a functional approach to law, citing his writing in a 1919 edition of the *Proceedings of the American Bar Association*,¹³ and the efforts of Oliver Wendell Holmes to apply scientific methods to the practice and study of law.¹⁴ He considers the controversies over whether Holmes' writing implied the presence or absence of moral considerations in a lawyer's work (whether a lawyer's role should be limited to predicting how a court would rule on the basis of extant law versus a lawyer's duty to argue what the law should be) and the migration of Holmes' innovative articulations of the law in the face of growing urbanization and industrialization of American society, from their initial expression in his dissenting judicial opinions to adoption in rulings by majorities of the Supreme Court.¹⁵ In the work of Holmes, he finds the influence of pragmatic and utilitarian approaches to the philosophy of law. In the work of Pound, and particularly his utilitarian thesis of “maximum satisfaction of human desires with minimum of sacrifice,” he finds the roots of concepts characteristic of American law, such as public policy, social

7. *Declaration of Independence: A Transcription*, NAT'L ARCHIVES, http://www.archives.gov/exhibits/charters/declaration_transcript.html (last visited Oct. 18, 2016).

8. *See id.*

9. Del Duca, *supra* note 3, at 489-90.

10. *Id.* at 490-91.

11. 5 U.S. 137 (1803).

12. Del Duca, *supra* note 3, at 490-91.

13. Del Duca, *supra* note 3, at 492 (citing Roscoe Pound, Forty-Second Annual Meeting of the American Bar Association. *The Administrative Application of Legal Standards* 445 (Sept. 3-5, 1919)).

14. *Id.* at 493-96.

15. *Id.*

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utility, social interest, and public interest, serving among other things, as foundations for developments of concepts such as strict liability in tort.¹⁶

Concerning the role of judges and the process by which a judge determines how to rule, Professor Del Duca reviews works of John Chipman Gray (identifying the judge as the one who determines the law, drawing upon statutes, precedents, expert opinion, customs, and moral principles as sources), Jerome Frank (applying psychoanalysis to understand the conduct of a judge), and Benjamin Cardozo (examining the rational process by which a judge might rule).¹⁷ He devotes particular attention to the then contemporary thought of Harvard Professor Lon Fuller that the law is comprised of the methods through which one achieves the possibility that people might live and work together.¹⁸ He concludes his consideration of Fuller's thought with contrast of how Fuller's teleological approach contradicts the formalism of Hans Kelsen, in respect of how each would approach the role of the United Nations General Assembly in the event that the Security Council would be unable to reach the decisions necessary to accomplish its institutional purpose, finding that Fuller's approach would afford the General Assembly the authority necessary to act as a supplement in the inability of the Security Council to act, and more broadly that the problems of the international community demand such a flexible approach.¹⁹

Professor Del Duca concludes his work with attention to the writings of Joseph Keenan and Brendan Francis Brown on the Nuremberg and Tokyo Trials.²⁰ He notes the existence of positive treaty law to define crimes of conducting wars of aggression, war crimes, and crimes against humanity prosecuted in those trials, but highlights the thoughts of Keenan and Brown that those trials manifested a recognition not only of the positive law definition of specific crimes, but also of immutable and eternal values of morality found in legal history and in philosophy.²¹

This work of a then recent law school graduate reflects an engagement with the leading lights of American legal thought of that time, a desire to translate those thoughts to another legal community—namely the Italian legal academy struggling to reconstitute itself as Italy determined what it meant to be a Republic rather than a monarchy and sorted through the heavy legacy of fascism and war, and an attention to the implication of those thoughts for international law. What followed its publication was a legal career that engaged its author deeply in the process of not simply addressing significant legal issues in one legal context, but also in considering and promoting awareness of the ramifications of those issues with an international perspective. In recognition of the achievements of that career, our Section of International Law earlier this year awarded him,

16. *Id.* at 496-97.

17. *Id.* at 498-501.

18. *Id.* at 501-04.

19. Del Duca, *supra* note 3, at 505-06.

20. *Id.* at 506-08.

21. *Id.*

posthumously, its Leonard J. Theberge Award for Private International Law.²²

III. An Anthropologic Approach to Comparative Commercial Law

Professor Kozolchyk dedicates his opus, *Comparative Commercial Contracts: Law, Culture and Economic Development*, to family, three key mentors, and “the United States of America, the country that brought us together.”²³ Those mentors, Hessel Yntema, Julius Stone, and Adamson Hoebel, were at the heart of the early development of legal realism and its application to legal systems extending beyond those of the United States, as well as the grounding of that elaboration in simultaneously sophisticated appreciations of the history of law (notably Roman law), comparative law, anthropology, and sociology. Like their pupil, Professor Kozolchyk, they benefited from cosmopolitan training and a first hand appreciation of the law as a tool to confront authoritarianism. Like them, Professor Kozolchyk is not simply a professor at a leading American law school; rather, he is an intellectual of the global traditions of the rule of law, a scholar of their dynamics, and a law reformer unconstrained by ephemeral boundaries of nation states and cultural norms.

For a bright student to study with Professor Kozolchyk, the rewards must surely include to be armed with the techniques not only of reading and researching the law in a formal sense, but also to parse the concurrent roles of altruism and selfishness, all with a view to understanding the role of formulation of the law as critical to the construction of community and society. For Professor Kozolchyk, this approach is not merely intellectual, it is also intensely personal, as his graduate training in law in the United States revealed to him a legal system that, in its preoccupation with justice, stood in stark contrast with his experience of the law as he grew up under Cuba’s Battista Dictatorship. Moreover, Professor Kozolchyk benefits from some twenty-five years of leading the National Center for Inter-American Free Trade as a premier center of commercial law reform initiatives, notably in Latin America, but also in Africa, Asia, and Europe. Thus, as both a scholar and as a practitioner of the disciplines of law reform, the focus of his 1,200 plus page *Comparative Commercial Contracts: Law, Culture and Economic Development* is “to facilitate a deeper understanding of the law of commercial

22. ABA Section of International Law Council Meeting. *Meeting Minutes* (Apr. 12, 2016), available at http://www.americanbar.org/content/dam/aba/uncategorized/international_law/final_council_meeting_minutes-_april_2016.authcheckdam.pdf. Our Section likewise honored Professor Kozolchyk with the award in 2004. *Section of International Law Awards*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/international_law/section_awards.html (last visited Dec. 5, 2016).

23. BORIS KOZOLCHYK, *COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE AND ECONOMIC DEVELOPMENT* iii (2014).

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contracts as it fulfills its purpose as an agent of economic development or fails to do so.”²⁴

As an able educator, Professor Kozolchyk appreciates the value of a well-told story. For example, to underline the significance of standard and best practices in the development of effective commercial law, Professor Kozolchyk puts forward the experiences of a cast of historical thought leaders, running from the Roman jurist Ulpian, through Lord Mansfield and the drafters of the German Commercial Code, and on to Justice Cardozo.²⁵ Likewise, to illustrate the values of transparency, he offers examination of what he labels “simulated contracts,” i.e. contracts nominally respecting a set form, but in fact intended by the parties to achieve a result otherwise disfavored by the law.²⁶ He grounds his analysis of these practices and their dysfunction in the Roman and subsequent civil law “typification” of contracts to determine the remedies, rights and duties corresponding to a given type of contract, and also in current public law manipulation of municipal and national government financial statements, as well as in biologist Edward O. Wilson’s recent works on altruism.²⁷

Throughout, Professor Kozolchyk challenges his reader to invest the attention to garner the full riches of the work. The reader who is able, but limited in ambition, can pick chapters to support quickly learning how a specific body of law works. For example, embedded in Chapter 24 is a brilliant description of the law concerning letters of credit.²⁸ In thirty-some pages, Professor Kozolchyk reviews their origins, lays out the fit between global letter of credit practice and the law of various jurisdictions within and without the United States, and offers any of the practicing lawyer, banker, or corporate financial officer the insight required to navigate their use in a business transaction and the related issues of definition and invocation of useful applicable law.²⁹ To achieve the reward requires identifying this gem through penetration of the work’s table of contents that appears addressed to a far more ambitious reader, namely, the reader who seeks to understand how to contribute to the reform of the law of commercial contracts so as to contribute to economic development. For this latter reader, Professor Kozolchyk’s work offers a continuously thrilling ride, in scope that Professor Roy Goode rightly labels in its Foreword as “astonishing both in its subject-matter and in the variety of sources on which it draws.”³⁰

Professor Kozolchyk demonstrates the fearlessness of his analysis with a review of the U.S. Supreme Court’s failure in its 1986 decision of *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*³¹ to appreciate the prevalence in Japan of

24. *Id.* at 3.

25. *Id.* at 4-12.

26. *Id.* at 12.

27. *Id.*

28. *Id.* at 1049-80.

29. KOZOLCHYK, *supra* note 23, at 1049-80.

30. *Id.* at vii.

31. 475 U.S. 574 (1986).

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“pervasive social organization” over “law and free business activity. . . .”³² In Professor Kozolchyk’s view, the Supreme Court’s failure of appreciation led it, wrongly, to rule unfavorably in respect of the American manufacturers’ claims of conduct on the part of the Japanese competitors in breach of antitrust norms.³³ Professor Kozolchyk finds confirmation for his view in the subsequent collapse of American television production.³⁴ This review might be enough for a conventional lawyer, but Professor Kozolchyk promptly pushes it further in a microcosm/macrocosm analysis of the divergences of U.S. positions from those of Germany and Japan in his experience of the negotiation of the UN Convention on Independent Guarantees and Stand-by Letters of Credit.³⁵ In the microcosm, Professor Kozolchyk commences with an exposition of the dynamics of independent guarantees and stand-by letters of credit, sufficiently detailed to warm the heart of any hard-core commercial finance lawyer.³⁶ He quickly moves from the micro to the macro to paint the German and Japanese positions favoring a softening of the separation of a bank’s payment obligation under a letter of credit from any consideration of the adequacy of the performance of the underlying obligation as a further manifestation of his observation that appreciation of business culture is critical to understanding the substance of the law in action as well as its formulation.³⁷ To wit, he identifies the German and Japanese positions as respectively flowing from the desire to protect national manufacturing interests even at the expense of the national financial sector and from the desire to penetrate global markets.³⁸ He concludes this exposition with the example of a bank failure associated with the bank’s macro focus to consummate deals so as to acquire market share, rather than a micro focus to assure the prudence of each individual deal.³⁹ In these twelve pages,⁴⁰ Professor Kozolchyk manages a deep dive into a specialized area of contract law, but combines it with an appreciation of the dynamic connection between the legal details and the larger economic, social, and political contexts. Professor Kozolchyk’s deft combination of micro and macro elements in these pages is emblematic of what follows in the further 1,200 pages of his work.

32. KOZOLCHYK, *supra* note 23, at 28-29.

33. *Id.* at 25.

34. *Id.*

35. Recently transmitted by President Obama to the US Senate with a recommendation for ratification. See Barack Obama, President of the United States, *Message to the Senate—The UN Convention on Independent Guarantees and Stand-by Letters of Credit*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Feb. 10, 2016), <https://www.whitehouse.gov/the-press-office/2016/02/10/message-senate-un-convention-independent-guarantees-and-stand-letters>.

36. KOZOLCHYK, *supra* note 23, at 29-34.

37. *Id.* at 32.

38. *Id.* at 33.

39. *Id.* at 34.

40. *Id.*

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Brexit poses the question of London as a European and global financial center.⁴¹ Although Professor Kozolchyk published his work before the Brexit vote, his examination of why England developed a flourishing culture of commercial credit in the late 1600s and early 1700s while France did not, resonates with current commercial realities.⁴² In particular, Professor Kozolchyk anchors his examination in analysis of the common law doctrines pertaining to reasonableness and trust relative to the formalism of French legal scholarship focused on concepts of *causa* divorced from context that included both broad notions of usury and strong antipathy towards it.⁴³ In so far as the formalism antithetical to Professor Kozolchyk's anthropological focus on context and real word practice persists in French law and those legal systems influence by it, he appears to offer insight as to why Paris struggles to become a global financial center akin to London or New York.⁴⁴ Ominously for Paris in any competition with Frankfurt or Dublin to advance as a financial center, Professor Kozolchyk digs into the thoughts of a leading German legal scholar instrumental in what would become the practical approach of the German Commercial Code, namely Rudolf von Ihering. Having laid out the limitations of French commercial law inherent in its conceptualization relative to German law, Professor Kozolchyk, towards the end of his work, offers a review of the development of English commercial law in ways that parallel and exceed those of German commercial law, with attention to the elaboration of the common law and the equity jurisdictions in England, and notably the interactions of Lord Mansfield, juries and merchants associated with English law's facilitation of recognition of the negotiability of bills of exchange and promissory notes.⁴⁵

Professor Kozolchyk is impatient with formalism and its advocates. Unfortunately for such advocates who might seek to wrap themselves in the flags of legal science or of tradition, Professor Kozolchyk is not only an insightful legal anthropologist, but also an avid student of legal history. Thus, to the Latin American formalist drawing upon the text of Chile's influential Civil Code of 1857, to defend not only the confinement of the interpretation of a contract to the formally concluded text but also the sacrosanct quality of the requirement of conclusion of such a contract before an impartial notary, Professor Kozolchyk is quick to quote not only the words of that Code's principal author, Andres Bello, to identify the initial contextual purpose of such a requirement as impeding the disposition of disputes by fraudulent testimony, but also to challenge the relevance of the initial premise in contemporary society where business dealings broadly and

41. And, it may work against the growing choice to employ English for the legal aspects of business. See PATRICK DEL DUCA, CHOOSING THE LANGUAGE OF TRANSNATIONAL DEALS: PRACTICALITIES, POLICY AND LAW REFORM (2010).

42. See KOZOLCHYK, *supra* note 23, at 776-82.

43. *Id.* at 778-79.

44. See *id.* at 776-82.

45. *Id.*

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successfully occur outside the framework of formalization of contracts as public writings before a notary.⁴⁶

Few authors can authoritatively take to task an array running from Andres Bello, through Oliver Wendell Holmes Jr., and Alan Greenspan, and on to Marx and Lenin, each for the vice of conducting analysis on the foundation of an “unrepresentative commercial archetype.”⁴⁷ Professor Kozolchyk does not hesitate to do so, and he applauds those who get it right, e.g. Justice Cardozo in his elaboration of the standards for discharge of fiduciary responsibilities, that he anchored to the behavior of an archetypical “man of the most delicate conscience and the nicest sense of honor.”⁴⁸ More deeply, Professor Kozolchyk takes aim at those who argue that civil law legal systems must rely on formalism to the exclusion of consideration of factual context. To those who argue that such formalism is in the tradition of Roman law, Professor Kozolchyk reviews the relevant practice of Roman law in Roman times to conclude that its classificatory formalism served largely for purposes of determination of procedure and choice of remedies.⁴⁹ To those who argue that such formalism is justified as in a scholastic tradition rooted in Aristotelian concepts of essences, Professor Kozolchyk calls out the negative practical consequences of such formalism, including inequitable and unreasonable outcomes in dispute resolution and the susceptibility to bribery of judges insulated from the obligations to make factual findings as foundation for their rulings.⁵⁰

Professor Kozolchyk consistently lays out his claims, and then provides his foundations for them, e.g. detailed discussion of Justice Cardozo’s opinions in *Meinhard v. Salmon*⁵¹ and *MacPherson V. Buick Motor Co.*⁵² laying out his use of factual and analogical reasoning.⁵³ In contrasting Justice Cardozo’s approach to a civil law lawyer’s formalistic approach to the drafting of a law of negotiable instruments, Professor Kozolchyk takes direct aim at his target, a mercifully unnamed Nicaraguan drafter of a negotiable instruments law.⁵⁴ Professor Kozolchyk asserts: “[h]is method lacked the right goal, the proper analytical tool and the required data.”⁵⁵ Ever the practitioner of law reform, Professor Kozolchyk then lays out the methodology of his National Law Center in its studies of the functioning of secured lending throughout the Americas.⁵⁶ The methodology is evidence-based, and although it incorporates mastery of the nuances of the formal law, it addresses “the archetypal behavior of borrowers, lenders, appraisers of the value of

46. *Id.* at 38.

47. *See* KOZOLCHYK, *supra* note 23, at 38-47.

48. *Id.* at 44.

49. *Id.* at 49.

50. *Id.* at 53.

51. 164 N.E. 545 (N.Y. 1928).

52. 111 N.E. 1050 (N.Y. 1916).

53. KOZOLCHYK, *supra* note 23, at 59-65.

54. *See id.* at 65.

55. *Id.*

56. *See id.* at 75-76.

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collateral, warehousemen or custodians, and other likely participants in the secured transaction, including lawyers and judges.”⁵⁷

Professor Kozolchyk offers as a constant of commercial contracts “that they are means towards the end of facilitating trade and that as such they must be consistent with the cooperative instinct of the trading man.”⁵⁸ Through the lens of this constant, Professor Kozolchyk examines the mutability of the dogmas espoused by the intellectual parents of the *Code Civil*, Grotius and Pothier, the persistence of familial and clan relationships in the contemporary practice of contract law in emerging economies such as China and India, and the inherent disposition of planned economies to failure by virtue of inability to accurately price the factors of production.⁵⁹

As an American law professor, Professor Kozolchyk does not confine himself to preaching. Rather, by way of example, Chapter 3 offers points for discussion and reflection, intriguingly focused around the intersection of anthropology and commercial law reform. These points cover the origins of contracts in agricultural societies, jural postulates as considered by Roscoe Pound, Edward Hoebel, and Karl Llewellyn, and the proper roles of comments and legislative history in statutory drafting in light of the views of Mexico’s Raul Cervantes Ahumada, who disfavored any explicit reference to such materials in statutory drafting.⁶⁰ Professor Kozolchyk’s global ambition includes identification of the legal principles that make possible the transition from a pre-commercial society to a commercial society. In this quest, he guides the reader through the touchstones of standard comparative law courses focused on French and German legal materials and their roots in Roman law, but also digs deeply into Soviet and Chinese commercial law. From these materials he finds that the relevant legal principles include:

- (1) the parties’ freedom to enter into contracts, including their contractual power to limit their liabilities;
- (2) equal and fair treatment of merchants and consumers;
- (3) a view of contracts as the . . . receptacles of the parties’ reasonable expectations rather than as the result of “zero sum” negotiations;
- (4) the legal protection of third parties, including good faith purchasers and creditors, from equities and defenses derived from pre-existing or underlying transactions; and
- (5) a fair and predictable adjudication of disputes among merchants and their customers.⁶¹

As Professor Kozolchyk initiates the journey into the world of comparative commercial law, he fortifies the reader with a grounding in

57. *Id.* at 75.

58. *Id.* at 82.

59. KOZOLCHYK, *supra* note 23, at 81-82, 86, 90-93.

60. *See id.* at 101-02.

61. *Id.* at 653.

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Roman law.⁶² For both the common law lawyer and the civil law lawyer, Professor Kozolchyk's review offers insight into how Roman law really worked, thereby enabling the lawyer to critically evaluate contemporary assertions of justifications of formal positions in the world of civil law as derived from Roman law (hint: Professor Kozolchyk finds such assertions generally unjustified).⁶³ For the student of intellectual history, Professor Kozolchyk's exposition of Roman law affords understanding of why the nineteenth-century German Pandectists regarded the *Corpus Juris Civilis* as the inspiration for their legal science, which took commercial law in a much more practical direction than the French Civil Code.⁶⁴ As a reinforcement of Professor Kozolchyk's cosmopolitan and global approach to the examination of law and its roots, though not dwelled upon by Professor Kozolchyk, it is worth bearing in mind that after the split of the Roman Empire into Eastern and Western components, the *Corpus Juris Civilis* was issued from Constantinople (today's Istanbul).⁶⁵

Professor Kozolchyk extracts from a thousand years of medieval law the incubation of contemporary principles of the law of negotiable instruments, which resulted from the application of Roman law concepts as international trade resurged in the Late Middle Ages, the rise of "double-entry" bookkeeping, and the rise of concepts of commercial fairness in Mediterranean trade involving Arab and Jewish merchants.⁶⁶ As evidence of the emergence and indeed celebration of the recognition of the value of entrepreneurialism, he offers the historical celebration of the English tale of St. Godric of Finchale and the early Spanish picaresque novel, *La vida de Lazarillo de Tormes, y de sus fortunas y adversidades*.⁶⁷ He also notes the rise of the Medicis of Florence, the Fuggers of Bavaria, and the Ruizes in Spain and France.⁶⁸

He does not overlook the constraints of feudalism, i.e. the ability of those in hierarchical superior social status to assert privileges unavailable to others, and indeed offers this phenomenon as foreshadowing practices in contemporary emerging economies such as that of China, notwithstanding the simultaneous development of commercial law supportive of economic development.⁶⁹ Likewise, he introduces the medieval emergence of the conceptualization of usury as both morally wrong and as extending to any charge of interest, a conceptualization as to which English King Henry VIII's 1545 Statute of Usury marks, at least as to the English-speaking world, a turning of the tide by defining only interest in excess of 10 percent

62. See *id.* at 103-35.

63. See *id.* at 4.

64. See *id.* at 135, 410, 419-20.

65. See ARTHUR VON MEHREN, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 6-7 (2d ed. 1977).

66. See KOZOLCHYK, *supra* note 23, at 139-71.

67. See *id.* at 143-45.

68. See *id.* at 145.

69. See *id.* at 140.

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as usurious.⁷⁰ Ever ready to advance his arguments as to the costs of the inadequacy of the view of commercial law as anything other than the law of a community collaborating in the accomplishment of fair dealing, he offers contemporary examples of the costs of commercial credit in Latin American jurisdictions as evidence of the dysfunction associated with the recurrent application of the medieval distrust of merchants and commerce.⁷¹ He is also critical of Spain's highest court for a 2000 decision in which it appeared, uselessly in Professor Kozolchyk's view, to engage in a process of medieval, canon law scholastic reasoning to distinguish the imposition of interest in a simple loan agreement from the imposition of interest in a financial lease, i.e. a loan secured by a particular piece of equipment as to which the borrower would hold a purchase option.⁷² Further, as part of his professorial role, he not only reviews the contributions of Maimonides to twelfth-century Jewish commercial law, but also frames questions for the reader in the nature of, "Maimonides applied Jewish commercial law with the result that . . . ; how would the law that you know best resolve the case?"⁷³

In the appendix to the chapter on medieval law,⁷⁴ Professor Kozolchyk poses further questions for the reader to ponder, based on materials relevant to decisions of commercial disputes regarding procedures that demand oaths from the counter-party and on materials related to the treatment of principal and agent relations in common law, European and Latin American civil law systems, and European Union law. In addition, this is all building on a critical examination of the continuing value of medieval remnants in the context of achieving a modern law supportive of commercial law as a tool for economic development. Professor Kozolchyk caps his review of medieval law developments with consideration of the emergence of the enforceability of contracts in the English wool industry in the thirteenth and fourteenth centuries.⁷⁵ Laying the foundation for conclusions later in the book, he sets forth the limitations of the advances achieved by the development of concepts of merely fraternal obligations of trust and fairness, as compared with the concepts established in the English wool industry, which foreshadowed the framework of the Uniform Commercial Code's Article 9, providing for the lender and borrower not only to memorialize their deal, but also to provide public notice of it.⁷⁶

Professor Kozolchyk continues his criticism of unhelpful historical doctrinal and cultural remnants in his exposition of the late medieval organization of guilds and Colbert's mercantilism, which were superseded by street markets and supranational trade fairs that ultimately enabled merchants, including providers of credit, to overwhelm the guild effort to

70. See *id.* at 150-56.

71. See *id.* at 146-48.

72. See KOZOLCHYK, *supra* note 23, at 152-53.

73. See *id.* at 157-62.

74. See *id.* at 171-89.

75. See *id.* at 164-71.

76. See *id.* at 167-71.

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define monopolies, whether to assure subsistence of guild members or to capture monopoly rents.⁷⁷ He ties the legacy of guilds and mercantilism to the duality of civil and commercial codes exemplified by French and German private law, the civil codes of each country imposing the use of a limited number of forms of contract with mandatory terms, and to varying degrees the commercial codes affording merchant parties greater autonomy in the definition of their contractual relationships.⁷⁸ He also observes how the guild-influenced concepts of the civil law continue to resurge in various aspects of interpretation and application of the commercial law.⁷⁹

In describing the role of a civil law notary and contrasting it with that of a notary public, familiar under the law of the various states and related jurisdictions of the United States, Professor Kozolchyk varies his method of presentation.⁸⁰ In addition to identifying the historical origins of the contemporary roles of civil law notaries in Roman law, medieval law, and early formulations of civil law codes in the French, German, and Spanish spheres of influence, he provides insightful anecdotal understanding of how the roles of civil law notaries varied in time and place in jurisdictions such as Austria, Belgium, Costa Rica, France, Germany, Mexico, and Sweden.⁸¹ Through interviews, notably with Costa Rican and Mexican notaries,⁸² he effectively and sensitively brings out divergences between the formal written law and the actual practices, with attention to quality control, competition, and integrity. To the reader he poses the question of whether the guild-like monopoly of a notary as a neutral professional is required and beneficial for the conduct of commercial, financial, and real property transactions.⁸³ His chapter on notaries, analogous to the quality of the insights offered by others of his work's chapters, frames the salient issues in ways that arm the attentive reader to participate in debates about key topics of commercial law. In this instance, he invites the reader to consider the appropriate roles of notaries with the benefit of comparative insight. In 2014 the American Bar Association addressed this issue and adopted a resolution in favor of reforming the laws regarding cross-border verification of signatures,⁸⁴ a development followed by the Uniform Law Commission's adoption of an amendment to its Law on Notarial Acts that relaxes the requirement that a

77. See *id.* at 191-208.

78. See KOZOLCHYK, *supra* note 23, at 211-13.

79. See *id.* at 212.

80. See *id.* at 215.

81. See *id.* at 216-40.

82. See *id.* at 229-37.

83. See *id.* at 237, 242; see also Patrick Del Duca, *Why Some Civil Law Systems Burden Notice-Filing with a Civil Law Notary "Public Writing" Requirement*, 44 UCC L.J. 1, 1-2 (2011) (framing assessment of the benefits of notarial involvement in the context of how the broader legal system functions).

84. See Gabrielle M. Buckley & Hugh B. Wellons, *Rep. to the H. of Delegates.: Res. 114A*, 2014 A.B.A. SEC. INT'L L. & SEC. SCIENCE AND TECH. L. 1, available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_114a.authcheckdam.pdf.

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notary public's verification of the identity of a signer happen through the physical presence of the signer before the notary.⁸⁵ The change, controversial in some circles, notably the notary professional associations, reflects an increasing responsiveness to the possibilities and use of a secure digital signature in various countries of the world and in some states of the United States.⁸⁶ Professor Kozolchik's chapter, although written before these current developments, offers valuable and lasting insight into the structure of debates likely to endure for some time. By way of example, his insights enable a reader of the materials preceding the American Bar Association's adoption of its relevant policy in favor of law reform to better understand the developments in notarial practice there reported in respect of numerous countries.

Comparative law courses, at least in American law faculties, typically devote attention to the development of codification in French and German law as influential across the range of civil law jurisdictions.⁸⁷ Arthur Von Mehren's classic casebook, *The Civil Law System; An Introduction to the Comparative Study of Law* covers the material highlighting how French and German civil law courts have in fact at key moments fundamentally re-interpreted code provisions relevant to contract and tort law, notwithstanding the formal conceptualization of the role of such courts as merely to apply the law, rather than to make it.⁸⁸ Professor Kozolchik also addresses this subject matter, starting with the French *Code Civil* of 1804, followed by treatment of the French Commercial Code and the German Civil and Commercial Codes, with the unique addition of treatment of their counterparts in Latin America, Russia, and China.⁸⁹ But while Professor Von Mehren adopts a Socratic approach to lead the reader to understand his points, Professor Kozolchik guides his reader more directly, focusing the reader on understanding his views of why the German approach has proven more fruitful for commercial law than the French approach.⁹⁰

Professor Kozolchik does not hide his view of the importance of grounding commercial law in the empirical practices of those engaged in commerce.⁹¹ As he lays out the intellectual provenance of the *Code Civil* in the writings of Grotius and Pothier, the Enlightenment, and Napoleon's

85. See 2016 Amendment to Law on Notarial Acts, UNIFORM L. COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Law%20on%20Notarial%20Acts,%202016%20Amendment%20to> (last visited Oct. 16, 2016).

86. See, e.g., *Cross-Border Signature Verification – Civil Law Notaries & Notaries Public – Hague Apostille Convention – Vienna Convention on Consular Relations*, EUR. UPDATE (A.B.A. Sec. Int'l L.), Mar. 2013, at 1, 9-10, available at http://www.americanbar.org/content/dam/aba/uncategorized/international_law/_ic825000_newsletterpubs_aba_sil_europe_committee_europe_update_issue4_march2013.authcheckdam.pdf.

87. See, e.g., ARTHUR VON MEHREN, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 3 (2d ed. 1977).

88. See *id.* at 87-95, 617-32, 1127- 61.

89. See KOZOLCHYK, *supra* note 23, at 245-746.

90. See *id.* at 434-35.

91. See *id.* at 334-42.

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imposition of rationalism on the ashes of the French Revolution and its breaks with feudalism and guilds, Professor Kozolchyk reconstructs the *Code Civil* as a framework for the conclusion of contracts among the minority of France, comprised at the time of its 1804 adoption by the bourgeoisie, the limited number of French individuals with assets who accordingly prized respect of property rights and the certainty associated with formality in contracting, to the detriment of the fluidity required for active commerce.⁹² Professor Kozolchyk digs directly into the failings for commercial law of the *Code Civil*'s embrace of scholastically-inspired definitions and classification.⁹³ He also offers an appendix annotated with questions for the reader to appreciate how contemporary French law, faced with developments such as the conduct of commerce through the Internet, is stepping away, through court decisions and doctrinal writings, from the rigor of *Code Civil* requirements, e.g. those restricting enforceability of promises of deferred payment and performance.⁹⁴ Nonetheless, in his review of the French Commercial Courts, he highlights what he sketches as their continuing retrograde character relative to the commercial courts of the medieval maritime and trade institutions of both northern and southern Europe, which he ascertains is derived from a combination of refusal to appreciate the social value of merchant activities, reluctance to embrace the functions of interest and secured lending, and failure to appreciate usages of trade and standard and best practices among merchants.⁹⁵

Through a comparative examination of French and Mexican Civil and Commercial Code provisions, Professor Kozolchyk drives home the relative weakness of the *Code Civil* approach.⁹⁶ He demonstrates that Mexico's enumeration, inspired by French law, of the kinds of transactions subject to application of commercial law creates similar problems of uncertainty as to whether to look to the Commercial Code or the Civil Code for governing law.⁹⁷ He thus argues that it impedes effective conduct of business in regard to broad range of activities, spanning from agribusiness to insurance, swap, credit, and negotiable instrument transactions, to consumer transactions and also that it raises perceptions of inadequacy of Mexican judicial institutions.⁹⁸ He offers this as an example of how "one of the most serious problems posed by the scholastically-inspired commercial law writings is their inconsistency with market practices and with prevailing custom and usage."⁹⁹ Along the way, and drawing upon French, Honduran, Italian, and Spanish materials, he indulges in the fun of shooting down an Argentine legal writer's effort to

92. See *id.* at 247-80.

93. See *id.* at 265.

94. See *id.* at 280-91.

95. See KOZOLCHYK, *supra* note 23, at 297-325.

96. See *id.* at 342-49.

97. See *id.* at 347-49.

98. See *id.* at 349.

99. See *id.* at 341.

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better define the universe of “acts of commerce.”¹⁰⁰ Professor Kozolchyk identifies the effort as divorced from socio-economic context and marketplace realities, further arguing as evidence of the deficiency of a scholastic focus on definitions, the ability of those definitions to “inspire a code drafted by law professors supported by a fascist state to do its bidding and by a Marxist scholar intent on providing a developing nation with the best of his legal science.”¹⁰¹ Ever the practitioner of law reform, Professor Kozolchyk reviews the 1994 Convention of the Organization of American States on the Law Applicable to International Contracts as an open invitation to parties and courts involved in international contracting to supersede the inadequacies that persist in national law relative to definition of commercial acts by accepting its invitation to take account of international commercial usages and customs.¹⁰²

Professor Kozolchyk’s treatment of German civil and commercial codification reaches deeply into the work of the Pandectists—the nineteenth-century German scholars who sought to construct a legal science based on careful analysis of Roman law, notably as set forth in the *Corpus Juris Civilis*—and their contemporary rivals, the intellectual predecessors of the legal realists, notably Levin Goldschmidt.¹⁰³ Professor Kozolchyk lays out the intellectual debates over the propriety of conceiving the law as a science to be set forth according to principles of scholastic reasoning versus an approach of empiricism focused on identification of actual practices and usages with a view to definition of standard and best practices.¹⁰⁴ His exposition of these debates is based on a foundation of the history of German unification (the first one in the 1800s) and the transformation of its economy from one of feudalism and guilds as well as with the benefit of the initial drafting and subsequent amendments through to the present-day German Civil and Commercial Codes.¹⁰⁵ In his view, the distinction between civil and commercial law in each of the French and German systems is ill-conceived for purposes of furthering economic development, but the initial German approach of according automatic merchant status, and hence applicability of the commercial code, to anyone who habitually conducted transactions listed as commercial transactions, afforded broader applicability of commercial law and greater openness to definition of that law with reference to the practices of merchants.¹⁰⁶

As to both French and German law, Professor Kozolchyk offers review of their use of sources of law. He notes the relative unavailability of the texts of

100. *See id.* at 336-38.

101. *See* KOZOLCHYK, *supra* note 23, at 338.

102. *See id.* at 346-47; *see also* Inter-American Convention on Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No. 78, *available at* <http://www.oas.org/juridico/english/treaties/b-56.html>.

103. *See* KOZOLCHYK, *supra* note 23, at 410-13, 441-46.

104. *See id.* at 441-46.

105. *See id.* at 377-407.

106. *See id.* at 423.

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judicial decisions, the parsimony with which they are written, and the formal notion that they not have precedential effect.¹⁰⁷ He contrasts this with the reality of the significant persuasive effect of key judicial decisions and with the reliance on doctrinal writings.¹⁰⁸ Through the example of the Costa Rican case of *Picado Guerrero v. Rojas Dias*, in which doctrinal writings that address Mexican realities are misapplied, he trenchantly observes that doctrine as a source of commercial law is helpful only “as long as it takes into account the peculiarities of the marketplace to which it is supposed to apply.”¹⁰⁹

Turning to Latin American commercial law, Professor Kozolchik reviews the specific history of codification of commercial law in the region and how it incorporates various European models.¹¹⁰ He provides an anthropological perspective on the history of commerce in Latin America from colonial times and contemporary manifestations of “familialism” and “legalism” as impediments to economic development, associated with favoritism, bribery, and further undesirable consequences of mischaracterization of prohibited but desired transactions to simulate permissible dealings, e.g. achieving the imposition of interest in the face of draconian prohibitions of any interest as usurious and transferring ownership of land in the face of restraints on alienation of indigenously or communally owned property.

Professor Kozolchik’s exposition of Soviet commercial contract law is grounded in a review of Marx’s concepts, their extensions by Lenin, Stalin and Khrushchev, and the prevalence of familialism and legalism leading to bribery, adjudicative arbitrariness, legal uncertainty, and despotism, as well as failure to address aspirations of economic development.¹¹¹ He offers snapshots through time of how the Soviet Union wrestled with the place of law in an ideological context that expected the role of law to wither, the definition of private property and its permissible uses, the relationships of state planning to agreements among state enterprises, and the schizophrenia of ideological demonization of individual profit-seeking behavior versus the subversion of the priority of state interests with varying degrees of official acquiescence.¹¹² Exposure to perspectives on the developments in revolutionary Cuba that Professor Kozolchik experienced as a young lawyer highlights the significance of not only how the Soviet legal system continuously wrestled with how to come to grips with the lack of effective pricing mechanisms in a planned economy and with the inherent human tendency to seek personal gain that Adam Smith recognized as a foundation of the salubrious invisible hand, but also its global broadcasting of a model of legalism inconsistent with the rule of law, but supportive of despotism.¹¹³ In

107. *See id.* at 439-40.

108. *See id.* at 440.

109. *See* KOZOLCHYK, *supra* note 23, at 441.

110. *See id.* at 475-518.

111. *See id.* at 554-66, 566-84, 587-92, 589-98.

112. *See id.* at 557-614.

113. *See id.* at 568-85.

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the model of the effective teacher, Professor Kozolchyk offers a concluding assessment of the current state of Russian commercial law; he finds it encouraging for those aspiring to a “free marketplace of goods, services and ideas,” but that it replicates deficiencies of commercial law in civil law systems, e.g. in respect to secured lending and letters of credit.¹¹⁴

Professor Kozolchyk reviews China’s commercial law in the sweep of Chinese history, with reference to Mao’s efforts of collectivization, in light of Chinese culture, and with reference to specific current problems of finance related to the diffusion of wealth through real property transactions by participants ranging from collective entities anchored in various levels of government to individuals.¹¹⁵ In the uncertainties that he finds relative to the application of law and the enforcement of rights, he identifies the scourges to economic progress of familialism and legalism.¹¹⁶ Indeed, he lays out the parallels between the Mexican familial conception of *compadrazgo* and the Chinese conception of Guanxi, both designed to protect their participants, but likely “at the expense of the rights of others or those who are, in turn, third parties or strangers to that relationship.”¹¹⁷ With the benefit of review of the historical roots of anti-commercial attitudes and Confucianism’s lack of focus on actual practices and their improvement, he lays out how the scourges of familialism and legalism impeded development of the rule of law, and hence economic development, in Imperial China and how they continue to impede economic growth in contemporary China.¹¹⁸ Lest anyone think that Professor Kozolchyk seeks only to address anthropologists and political scientists, the final eighteen pages of his China materials lay out exactly what a secured lender would want to understand about the specifics of the contemporary legal framework for secured lending and letters of credit in China, including what a good practicing lawyer would want to know about issues of enforcement of rights.¹¹⁹

Although Professor Kozolchyk’s work is a casebook meant as material for a semester-long law school course, there is much to commend reading it from start to finish like a novel. A class might work through 100 pages of materials a week, so as to cover the book in a typical thirteen-week semester, but the richness of the material and examples suggests that a semester’s course could address half the book while offering the class a full experience. No matter how it is read, the manuscript shows Professor Kozolchyk as an undisguised fan of empiricism, ever searching for evidence of how commercial law evolves and of its impact on development. His findings of the good that emerges from the circle of honest merchants and the practices that they define and the synergy that emerges when the law embraces and affirms those practices become ever more persuasive as he journeys with the

114. *See id.* at 618, 619-20.

115. *See* KOZOLCHYK, *supra* note 23, at 689-99, 700-23.

116. *See id.* at 684, 695-723.

117. *Id.* at 662.

118. *See id.* at 633-64, 665-79.

119. *See id.* at 728-46.

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reader through regimes of commercial law across both historical and geographical confines.

Professor Kozolochyk dedicates the final portions of his work to aspects of Anglo-American law, escorting his reader through the distinct socioeconomic and legal contexts of commercial contracts under both English and U.S. law.¹²⁰ He devotes attention to the formation of contracts, the principles of good faith and reasonableness as guiding principles for the interpretation of contracts, the mechanisms for incorporating commercial practices into contract law, the implications of trial procedure for commercial law and concepts of pre-contractual liability, excuse for non-performance, extra-judicial remedies and their relations to specific performance, and damages for breach of warranty under U.S. law.¹²¹ As he introduces these topics with rich historical and sociological context that includes attention to the early links between U.S. and English law, Professor Kozolchyk forthrightly lays out the bad with the good, a key instance of the bad being the role that slavery played in the early history of the United States and the consequent enrichment of commercial interests in England.¹²²

Professor Kozolchyk opens his chapter on good faith and reasonableness in commercial contracts with the affirmation: “The enactment of Articles 1 and 2 of the U.C.C. and the Restatement (Second) of Contracts . . . signaled a radical departure from a contract interpretation that searched for intent primarily ‘within the four corners’ of the written contract or in the ‘plain meaning of its words.’”¹²³ He then proceeds to lay out the benefits of the evolution to attention to party conduct in the performance of contracts, especially with reference to courses of dealing and usages of the relevant trades.¹²⁴

For those who are not common law lawyers, as well as for common law lawyers who seek to understand the origins of their legal system, Professor Kozolchyk’s review not only of the early commercial law of both jurisdictions, but also of commerce as practiced in each and between the two, provides understanding of the emergence of current commercial practices and the corresponding law with respect to topics such as the organization of the retail sector, consumer credit, credit rating agencies, product warranties, commercial banking, bankruptcy, and the Uniform Commercial Code.¹²⁵ Again demonstrating his delight in deeply immersing himself in doctrinal questions for the purpose of focusing current policy and law reform, Professor Kozolchyk plunges into the origins of the doctrines of contractual consideration as they developed in English and U.S. law, comparing them to

120. *See id.* at 749-858.

121. *See* KOZOLCHYK, *supra* note 23, at 861-941, 943-1031, 1033-80, 1081-115, 1117-27, 1129-58, 1159-1214, 1215-45.

122. *See id.* at 760-65.

123. *See id.* at 943.

124. *See id.* at 943-99.

125. *See id.* at 792-831, 844-53.

the concept of *causa* in French law.¹²⁶ He shows how the doctrine of consideration furthered the progress of commercial law in common law jurisdictions, while the doctrine of *causa* did not.¹²⁷ In escorting the reader through the thoughts of Professor Alan Farnsworth and on to those of Lord Mansfield followed by the *Restatement 2nd of Contracts*, Professor Kozolchik lays out the benefits of the fading of consideration as a prerequisite to the enforcement of executory contractual promises.¹²⁸ Having done so, Professor Kozolchik offers as an appendix a series of materials comparing U.S., Spanish, and Latin American case law that address the associated questions of the role of solemnities and formalities in contracting.¹²⁹ Not content simply to pose the questions of the foundation of these practices in differing normative views and assessments of the values of scholastic and pragmatic reasoning as reflected in his review of the topics of consideration and *causa*, he challenges the reader to consider the burdens of the formality associated with contemporary Latin American practices of notarial formality relative to the treatment of corresponding transactions in Spain and the United States.¹³⁰

Through his concluding chapters on Anglo-American law, Professor Kozolchik celebrates the creativity of merchants and the ability of the law to incorporate that creativity in ways that enhance the conduct of economic activity.¹³¹ For the student of law, Professor Kozolchik offers not only the cogent exposition of the relevant doctrines of commercial law, but also a grounding in the dynamics of their continuing elaboration. Ever the passionate critic and coach, Professor Kozolchik further offers his reader understanding of why the culture, mores, and substance of commercial law as practiced in the United States furthered economic growth. Undoubtedly enthusiastic, Professor Kozolchik is continuously vigilant in focusing on the living law to highlight not only the elements of law and practice that he presents as worthy of emulation, but also the elements that result in dysfunction.

IV. The Shared Optimism of Professors Del Duca, Kozolchik and *The International Lawyer* in a Dynamic World

When Professors Del Duca and Kozolchik began their lives, the legal systems of multicultural empires such as those of the Ottomans and Austro-Hungary were recent realities, not distant memories, the Communist Party had not come to power in China, and the Cold War had yet to begin. Their engagement with the law, as professors in American law schools and as practitioners of law reform on a global scale, has drawn upon their shared

126. See *id.* at 861-917.

127. See KOZOLCHIK, *supra* note 23, at 862-71.

128. See *id.* at 902-14.

129. See *id.* at 917-41.

130. See *id.* at 930-34.

131. See *id.* at 980.

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understanding that the role of law in society and its importance to human endeavor transcend any narrow strictures, be they of national sovereignty, language, or cultural affinity. Yet, their work confirms the vision of each in which appreciation of the granularity of the workings of the law in a given subject-matter, time, place, and community affords the grounding to compare, and from the comparison, to offer insight into the ends achieved. Their common experiences of themselves moving from one country to another, of experiencing the consequences first hand of fundamental national transitions (Mussolini to launch of the Republic of Italy, Battista to Castro), and the shared legacy of families who transitioned from one continent to another in need and in search of a better future, empowered them to appreciate clearly the need for good law and the consequences of dysfunction in the working of a legal system.

In the fifty years of *The International Lawyer*, the restless curiosity of a community of able lawyers across a broad array of subject matters as to what the law is and what it should be is ever evident. It is the curiosity that Professors Del Duca and Kozolchik demonstrate in the two works of present focus. It is the curiosity of able practitioners of the law not content with understanding a single legal system in isolation, but rather fascinated with the crossing of boundaries of culture, place, and time, and with what can be learned from comparison, integration, and interconnection. Although the two works of present focus come from opposite ends of long and distinguished legal careers, they each manifest the alert curiosity of an enduringly young mind, tempered with awareness of what is at stake in questions pertaining to the rule of law.

Roberto Mangabeira Unger concluded his work, *The Critical Legal Studies Movement*, with a stirring condemnation of the conventional legal academy as “like a priesthood that had lost their faith and kept their jobs [, standing] in tedious embarrassment before cold altars.”¹³² Those who have made the acquaintance of Professors Del Duca and Kozolchik know that each throughout their professional lives has sustained an energetically optimistic view of his academic endeavors, mentoring of rising lawyers (men and women, of diverse backgrounds, and from around the world as well as the United States), and participation in rule of law reform initiatives. In their respective works here singled out for attention, they each eagerly dive into the enterprise of deconstructing orthodoxy that they find misplaced. In addition to the ability to be critical, they clearly share with participants of the critical legal studies movement an enthusiastic passion for the enterprise of understanding not only the law and how it works, but also to employ that understanding to good end. But, their motivations are not tinged with the “heart’s revenge” that Professor Unger found at the time in the “mind’s opportunity” of critical legal studies. Instead, their work appears infused with the optimistic spirit of Eleanor Roosevelt and others reflected in the opening declaration of the Charter of the United Nations:

132. ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 119 (1983).

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WE THE PEOPLES OF THE UNITED NATIONS
DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples.¹³³

This is the spirit of optimism, ambition, and engagement that I read in the works of Professors Del Duca and Kozolchyk here considered and that I see reflected in the fifty years of publication of *The International Lawyer* to date. As the members of our Section of International Law manifest this same spirit, and as they continue to esteem *The International Lawyer* as a premier venue for our community of lawyers to publish and to read the contributions of their most thoughtful peers, *The International Lawyer* has a bright future over its second fifty years.

133. UN Charter, available at <http://www.un.org/en/sections/un-charter/un-charter-full-text/>.

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