

No Right Answer?

JAMES Q WHITMAN

I. INTRODUCTION

THE TITLE OF this essay is, of course, lifted from one of the most famous articles in the literature of Anglo-American legal philosophy.¹ As we all know, Ronald Dworkin argued, in his 1977 article ‘No Right Answer?’, that there must indeed always be a right answer to any given question of law, despite the many seemingly intractable disagreements we discover among lawyers and judges. Dworkin’s claims have drawn numerous responses, and the ‘no right answer?’ debate has assumed a central place in the literature of legal philosophy.²

Why do I begin an essay celebrating Mirjan Damaška’s work in comparative law by invoking a debate among the legal philosophers? Because one of Damaška’s many striking contributions is his own analysis of the ‘no right answer’ problem. Indeed, Damaška has devoted much of his scholarly career to the question of whether legal systems must inevitably be committed to seeking the right answer, starting with his first major article in the pages of an American law review. ‘The Continental,’ Damaška argued in 1968,

will seek the right solution; his [American] counterpart will display a liberal agnosticism about “right” answers, coupled with a procedural outlook.

Instead of seeking the right answer, the American lawyer ‘will be primarily concerned about good arguments for a case.’³ In intriguing contrast to Dworkin, Damaška thus argued in 1968 that American law was exceptional among leading western systems in its reluctance to ‘seek’ right answers. In that 1968 article, and especially in his memorable 1986 book

¹ R Dworkin, ‘No Right Answer?’ in PMS Hacker & J Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford, Clarendon Press, 1977) 58, 58–84.

² See, eg, W Lucy, ‘Adjudication’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, OUP, 2002), 208–221.

³ M Damaška, ‘A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment’ (1968) 116 *University of Pennsylvania Law Review* 1363, 1375.

The Faces of Justice and State Authority, Damaška offered explanations for this peculiarity of American law that were, as I shall argue in this essay, of great philosophical interest. So I begin with an All Hail Damaška!, neglected philosophical voice in the no-right-answer debate.

My aim is not just to praise Mirjan Damaška, though. My aim is to bring together some of the wisdom of comparative law and the wisdom of legal philosophy. Since Damaška's first attack on the problem, comparativists have produced a variety of stimulating studies on the comparative lack of definitive answers (as I will call them) in American law. Indeed, in its own way, the no-right-answer problem has become as important in comparative law as it is in legal philosophy. Yet the two literatures are never read together. Comparatists and philosophers scribble away with no apparent knowledge that their colleagues down the hallway are at work on the same problem. I believe that this is a loss for both fields. A celebration of Mirjan Damaška, the most philosophically adept of comparativists, seems the right occasion to remedy that loss.

Accordingly my main purpose in this essay is to pursue the scholarly lead that Damaška gave us in 1968, writing comparative law in a way intended to interest both comparative lawyers and philosophers. I am not a philosopher, and I will avoid crossing swords with the philosophers on philosophical issues as much as possible. But I *will* argue that legal philosophers have missed some important issues through neglect of comparative law.

To be sure, all legal philosophers understand that legal systems differ from each other, and the problems of comparative law are hardly unknown to them. But when it comes to the no right answer problem they have not tried to work through the comparative law at any depth. This is something that the philosophers themselves acknowledge, let me rush to say, and with admirable frankness. Brian Bix, for example, an advocate of the view that the law is open to multiple answers, has the intellectual honesty to admit that his knowledge is drawn from American law: '[M]y examples,' Bix writes,

are all drawn from the American legal system, and I do not presume that they exemplify any (necessary or essential) aspect of all legal systems.

There may be non-American systems, he recognises, that do not 'allow one to speak of there being more than one correct – or "acceptable" – answer to a legal question.' Bix speculates that a person trained in such a non-American system might even doubt whether America had law at all – though he can detect no substance in such doubts:

It is conceivable that someone could put forward an argument that systems ... that are structured in such a way that there are *not* always unique correct answers to legal problems, are not 'really' legal systems (or not legal systems 'in

the fullest sense of the term.’). However, as I cannot now imagine how that position might be justified, I will not now concern myself with it.⁴

As these quotes suggest, Bix (and other Anglo-American philosophers, among them Dworkin⁵) have limited themselves to the Anglo-American tradition that they know.

The result, I believe, is that they have missed some data that ought to be of prime philosophical interest. In point of fact, as comparatists well know, there *are* people who believe that legal systems that do not provide ‘unique correct answers’ are ‘not “really” legal systems.’ In fact, there are many of them. Many legal traditions indeed (notably but not exclusively those of the European Continent) display a strong commitment to the proposition that there must be ‘unique correct answers.’ But at the same time there are others (notably but not exclusively the American tradition) that display a significantly weaker commitment to that proposition. There is indeed no such thing as ‘the’ view of ‘the’ law on whether there must be unique correct answers. Different legal cultures seem to bring quite different attitudes toward that question. This is itself a fact that deserves philosophical reflection.

My purpose, then, is to show that there are such different legal cultures of the right answers. In the effort to describe the differences between these legal cultures, I will propose a classificatory distinction – a distinction that requires us to parse Bix’s phrase ‘unique correct answers’ more finely. All of the systems that I will discuss are committed to the proposition that there are ‘right answers’ in some sense, I will argue. This is even true of America: Dworkin surely has it right on that score. But what matters, as I will argue, is that different legal cultures tend to conceive of ‘right answers’ differently. The Continental systems tend to seek answers that are not only *correct* but also *definitive*. They tend to treat the rule of law as requiring that all legal officials will generally produce the same answer to any given question. Other legal traditions, including the American, tend to devote themselves to the search for *correct* answers in a way that largely excludes the possibility that those answers could be *definitive*. I think that the real task of comparative law – and perhaps of legal philosophy – is to explain why this difference in the conception of right answers should exist.

II. NO RIGHT ANSWER: COMPARATIVE LEGAL PHILOSOPHY

The comparative law of right answers begins with Damaška’s 1968 article, ‘A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment.’ The article was written at a difficult time in Damaška’s

⁴ B Bix, *Law, Language, and Legal Determinacy* (Oxford, Clarendon Press, 1993), 95.

⁵ See, eg, RM Dworkin, *Law’s Empire* (Cambridge, Belknap Press, 1986), 88.

life, when he was deciding whether to emigrate from Tito's Yugoslavia. The fact that he was wavering between America and Yugoslavia is more than just a dramatic biographical detail. It is a telling part of the intellectual backdrop to his work. Damaška is the last of a series of immigrant scholars of comparative law who came to America as refugees from the totalitarian countries of Central Europe, most of them from Nazism. But Damaška is a distinctive figure within this remarkable group. This is partly because he was not a refugee from Nazism; but in a deeper sense it is because he is not German. Most of the leading refugee figures were German scholars to the core, who brought German ways of thinking and German approaches to American law. They were insiders to the German system who made intellectual advances by viewing American law from the outside.

Damaška, by contrast, is a Croatian, a man of the Continental periphery. To be sure, as a Croatian he belongs to a nation historically integrated into the Continental tradition, as he has shown better than anyone else through his studies of Croatian jurisprudence in centuries past. Nevertheless, as a Croatian (and one who traveled to distant Paris for part of his legal studies) he has always been able to maintain a kind of emotional detachment from Continental law even as he became an intellectual master of it. The same is true of his mastery of American law. One could say that Damaška is a full initiate of both traditions without ever having become a convert to either. This has always allowed him to write about both with a unique mix of intimate intuitive sympathy and ironic distance, as was manifest in his 1968 lecture.

The subject that this man of the periphery chose for his lecture, the 'no right answer' problem, was one of fundamental philosophical interest, and before turning to his approach it is well to review briefly its place in the history of legal philosophy. The desire for right answers in the law is very old, and so is scepticism about whether right answers can ever be given. The claim that there must be right answers is a claim that can be made with various degrees of subtlety and sophistication. The simplest variation consists in imagining a legal system in which there are unique correct answers to all legal questions, specified with perfect clarity in easily understood legal texts, such that persons who are subject to the law can know in advance, with perfect certainty, the legal consequences of any action they may take. Believers in this simple ideal would insist that without such perfect certainty there can be no meaningful rule of law. But there are very few true believers in this simple ideal, at least among legal philosophers. On the contrary, the history of modern legal thought both on the Continent and in the Anglo-American world has been largely the history of efforts to transcend the simple ideal of a rule of law founded on perfect certainty about right answers.

Before describing those efforts, though, it is wise to make the basic distinction that this essay is intended to pursue. The phrase 'right answer'

is ambiguous. When we speak of answers that are ‘right’ we may mean two things: we may mean that the answers are what I will call definitive, or we may mean that they are what I will call correct. A system that aims to give *definitive* answers, as I shall use the term, is a system that aims to guarantee that the same answer should always be given by every legal official, leaving no room for variation or discretion. To the extent a system succeeds in providing definitive answers to every possible legal question, it is a system that offers perfect predictability, at least in principle. A system committed to giving *correct* answers, by contrast, is a system that aims to give an answer that is correct according to the dictates of some understanding of legal reason.

It should be obvious that these are two distinct ideals. A system can be fully committed to giving definitive answers without having any particular commitment to giving correct answers, or even accepting the possibility of giving correct answers. Conversely a system can be committed to giving correct answers, while finding the process of determining those correct answers to be so difficult and plagued with uncertainty that no guarantee can be given that its answers will be definitive. (Classical Islamic Law is a prime example: It posits that there is always a unique correct answer, but that since unique correct answers are known only to Allah, while human beings must perpetually struggle to find them, it is impossible to provide definitive answers.⁶) The most naïve form of belief in right answers holds that a legal system can give answers to every possible legal question that are both correct *and* definitive. The distinction between the correct and the definitive is admittedly somewhat rough and ready, but as we shall see it is helpful for understanding the outlines of modern philosophical debate as well as comparative law both in America and on the Continent.

On the Continent the modern debate extends well back into the 18th century. In France, the debate was stimulated by the writings of Beccaria, and by a widespread hostility to judicial discretion.⁷ This hostility to judicial discretion is fundamental to the Continental tradition, and it is well to dwell on it for a moment. In the 18th century the French debate turned in part on a technical question in the law of criminal punishment, the question of the judge’s ‘arbitraire’ – that is, the judge’s authority to individualise some, but not all, punishments.⁸ It also turned in part on

⁶ See, eg, K Abou el Fadl, *The Authoritative and Authoritarian in Islamic Discourses: A Contemporary Case Study* 3rd edn (Alexandria, Al-Saadawi Publications, 2002).

⁷ For the French debate over Beccaria, see JQ Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford, OUP, 2003) 163, with further citations.

⁸ See A Laingui and A Lebigre, *Histoire du droit pénal*, (Paris, PUF, 1979), vol 2, 129–136.

the peculiar tradition of French hostility to the power of the *parlements*, the proudly ‘sovereign’ courts of the nobility of the robe.⁹

The 18th century debates culminated, in the French Revolution, with a concerted effort to bind judges by creating law sufficiently certain to eliminate their effective discretion. The great instruments for achieving this end were the codes, and in particular the iconic Code Civil, a model both of verbal clarity and of conceptual vagueness. The literature on the Code Civil is of course immense, but I think it is fair to say that the Code aimed to give answers that were both correct and definitive, and that it was largely motivated by a determination to limit judicial discretion.¹⁰ As Germans like to put it, the aim was to make the judge a ‘*Subsumtionsautomat*,’ an automaton who would spit out the right answer just as soda-pop machine spits out the correct bottle when fed the correct change.¹¹

Anxiety about judicial discretion has remained a constant of French legal thought down until the present day. Nevertheless by the end of the 19th century scholars like François Gény had come to the conclusion that it was impossible for the law to dispose of all questions in advance with certainty. This led Gény to insist that judges often had to decide cases through ‘free scientific research.’¹² Later francophone philosophers have all shared something like Gény’s scepticism,¹³ and French decisions today are indeed largely made through a kind of ‘free scientific research,’ which aims to uncover what might be called correct answers even at the cost of introducing some *de facto* uncertainty into French decisional law. Nevertheless, this free research goes on *derrière les coulisses*, as Mitchel Lasser has recently insisted, and French law continues to maintain a kind of public fiction that the law dictates answers that are both correct and definitive.¹⁴

German law does not maintain the same sort of public fiction, but in its own way the German tradition looks much like the French. In 18th- and 19th-century Germany, the debate turned in particular on the *Allgemeines Landrecht* of Prussia, the immense codification promulgated in 1794 that

⁹ B Stone, *The French Parlements and the Crisis of the Old Regime* (Chapel Hill, University of North Carolina Press, 1986).

¹⁰ Classic discussion in JP Dawson, *The Oracles of the Law* (Ann Arbor, University of Michigan Law School, 1968) 374–400.

¹¹ R Ogorek, *Richterkönig oder Subsumtionsautomat? : zur Justiztheorie im 19. Jahrhundert* (Frankfurt, Klostermann, 1986).

¹² F Gény, 2d (ed), *Méthode d’interprétation et sources en droit privé positif : essai critique* (Paris, LGDJ, 1919).

¹³ Eg, B Frydman, *Le sens des lois* (Bruxelles, Bruylant, 2005) 588–590.

¹⁴ M Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, OUP, 2004) 27–61.

purported to give definitive answers to every possible legal question.¹⁵ This project was, inevitably, a failure, and thoughtful German jurists, like thoughtful French ones, have understood ever since that it is impossible to resolve all legal problems in advance with certainty. Here again the critical developments came in the later 19th century and the early 20th century. There were even early 20th-century German philosophers who, partly inspired by a kind of Anglophilia, defended some fairly radical views of judicial discretion.¹⁶ Those radical views have had few advocates since 1914 or so, but it is certainly German philosophical orthodoxy that the law cannot specify definitive answers to all, or even most, questions in advance.¹⁷ As we shall see, though, that does not by any means imply that German jurists have given up on the project of attaining certainty within the limits of the possible. The bottom line is that Continental legal philosophers have long since rejected any naïve belief in the possibility of giving definitive answers to all legal questions. (It is more difficult to say whether Continental philosophers believe in the possibility of giving correct answers.)

In the Anglo-American world the modern debate is equally old, and Anglo-American philosophers have come to conclusions that are in many ways similar to those given by their European counterparts. The debate has been especially lively over the last few decades, owing to Dworkin's 1977 intervention, and it includes many ingenious and revealing contributions. This is not the place to review all of the Anglo-American literature. I will take the work of one author, Timothy Endicott, as an example of its depth and perspicacity. Endicott is not content simply to skewer the idea that any legal system could possibly provide a complete set of definitive answers in advance. He goes a step further, arguing that efforts to give definitive answers may in fact *diminish* the level of meaningful certainty in the law. Vagueness is not only inevitable, according to Endicott. It is necessary for proper rule of law.¹⁸ Endicott is one of many such Anglo-American voices. Even Dworkin treats the hunt for definitive answers essentially as at best a kind of necessary aspiration, rather than as a realisable ideal. In this, the Anglo-American is not much different from the Continental.

¹⁵ See, eg, F Wieacker, T Weir (trans), *A History of Private Law in Europe, with Particular Reference to Germany* (Oxford, Clarendon Press, 1995) 264.

¹⁶ For discussion, see W Fikentscher, *Methoden des Rechts in vergleichender Darstellung* (Tübingen, Mohr Siebeck, 1975) vol 3, 365–382; K Muscheler, *Relativismus und Freiheit: Ein Versuch über Hermann Kantorowicz* (Heidelberg, Müller Jur Vlg CF, 1984).

¹⁷ For an authoritative current statement, see W Hassemer, 'Rechtssystem und Kodifikation: Die Bindung des Richters an das Gesetz' in A Kaufmann, W Hassemer and U Neumann (eds), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart* 7th edn (Heidelberg, Auflage, 2004) 251–269.

¹⁸ TAO Endicott, 'The impossibility of the rule of law' (1999) 19 *Oxford Journal of Legal Studies* 1–18.

The Anglo-American tradition does differ from the Continental, though, in one striking way. Anglo-American philosophers give the impression of being far less concerned with the dangers of judicial authority. For Continentals, especially but not exclusively the French, the problem of right answers has always been, at base, the problem of limiting the scope of judicial decision-making authority. The Continental tradition presupposes a kind of sharp tension between rule of law and rule of men. Correspondingly, for Continentals, any maximalist understanding of judicial discretion smacks of philosophical radicalism.

Anglo-American philosophers, by contrast, are generally relatively untroubled by judicial authority. Dworkin, whose heroic judge Hercules has become a familiar stock figure of the philosophical *commedia dell'arte*, is the obvious example, but he is not the only one. Perhaps precisely because Anglo-American philosophers are less troubled by judicial authority than Continental ones, Anglo-American philosophers are less preoccupied by the pursuit of definitive answers. It is after all the very objective of a system dedicated to definitive answers to limit the scope of the authority of official actors. Here again, Dworkin is the classic example of a philosopher utterly committed to the pursuit of correct answers, while seemingly abandoning the pursuit of definitive ones.

III. NO RIGHT ANSWER: COMPARATIVE LAW

Whatever the differences between Anglo-American and Continental legal philosophers, though, they pale before the similarities. On the one hand, there is a consensus on both sides of the Atlantic, after many generations of debate, that no system can succeed in providing definitive answers to all possible legal questions. On the other hand, there is an absence of consensus on both sides of the Atlantic, after many generations of debate, on the challenging philosophical question of whether it is possible to give correct answers. In the end, the differences are not immense, and we can say that legal philosophy has attained much the same level of sophistication throughout the Atlantic world.

But that does not mean that the philosophically naïve idea that one must hunt for definitive correct answers has vanished from the law. On the contrary, as Damaška argued in 1968, and as he and other comparativists have repeatedly shown since, there remain occidental lawyers who are very much committed to the pursuit of definitive correct answers, whatever philosophers may say. But they are, for the most part, Continental lawyers and not American ones. Indeed, despite the broad agreement among philosophers everywhere, the differences in practice between the functioning of legal orders on either side of the Atlantic can be remarkable.

In part, the differences between the Continental and the American outlook are differences in legal reasoning and legal education, which are elegantly traced in Damaška's 1968 lecture. Damaška's lecture was entitled 'A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment.' This may seem an unpromising title, the title of the sort of lecture by foreign visitors that one endures rather than enjoys, but in fact Damaška had subtle things indeed to say. He described a kind of astonishment at the culture of American law that many foreign visitors feel.¹⁹ As Damaška explained it, he was the product of a Continental tradition that took it for granted that the law could be studied in an orderly and systematic way, in the effort to find 'right answers.' To such a product of Continental education, it was surprising, and perhaps even shocking, to discover that American law was different.

Now of course, the notion that Continental law is more systematic than American is familiar, and Damaška could easily have presented it in a banal way. He did not. On the contrary, he described the differences with a striking ethnographic detachment, a sample of his admirable ability to describe legal systems without becoming a captive of their basic assumptions. Continental legal education, as Damaška explained, 'involves exposure to ... the grammar of law, [and] a panoramic view of the most important fields of law.'²⁰ He described the 'grammar' and the 'panoramic view' in terms that deserve to be quoted at length:

In order to gain an understanding of Continental legal grammar, Americans should imagine lawyers of an analytic turn of mind à la Hohfeld at work for a long time, studying the law as it emerged from legal practice. Americans should further imagine that both the analysts' dissection of the law and their generalisations were generally accepted by the legal profession

Many rather amorphous American concepts would be subjected to rigorous analysis. An illustration is the concept of jurisdiction, with its bewildering number of meanings. Words and phrases like 'property,' 'standing to sue,' 'security' and 'mens rea' also come to mind. In the process of analysis the twilight zone of the concepts would be somewhat reduced, some of the sub-concepts isolated and separately labeled. A richer and more precise legal terminology would appear. Movement would also proceed in the opposite direction, that is toward the creation of more general, almost cathedral-like concepts. For example, inquiry into what contracts, conveyances and wills have in common would probably result in something similar to the Continental concept of legal transactions (*Rechtsgeschäft, negozio giuridico*). The newly created concepts would become accepted as elements of standard legal terminology. Study would then proceed to the relationships between such legal concepts.

¹⁹ Compare LE Nagle, 'Maximizing Legal Education: The International Component' (2000) 29 *Stetson Law Review* 1091 for similar autobiographical reflections.

²⁰ M Damaška, see above n 3, at 1364 and 1365 n 1.

Questions would be raised about the relationship of ‘jurisdictional’ to ‘procedural’ issues, of ‘mistake’ to ‘mens rea.’ Inquiry into relationships between concepts would be linked to an investigation into the nature or essence of concepts ... Thus, step by step, the conceptual digestion of the law would result in a network of precise interrelated concepts, broad principles and classificatory ideals. This network is the grammar of the law.²¹

The creation of such a grammar belonged to the effort to identify ‘right answers’:

There is a significant lack of the argumentative approach towards the law which permeates the atmosphere of law schools in [the United States]. The moving spirit of analysis is not the desire to find the best argument for a proposition, but rather the quest for the ‘right’ answer to the problem at hand.²²

As for the ‘panoramic view’: This offered a general account of the state of any given area of law. ‘This comprehensive view of the whole’:

is considered to be of utmost importance. It is feared that if the young lawyer fails to perceive the great contours of private and public law in school, he will seldom acquire an overview later in practice. Entangled in the jungle of practical problems, he will be deprived of the guidance that comes from an awareness of the totality of law in his particular field.²³

American law, by contrast, had ‘no real counterpart to the Continental grammar of the law.’²⁴ Indeed, Americans were ‘sceptical at best of the usefulness of the curious conceptual structure[s]’ of the Continent. Instead, they devoted themselves to an argumentative mode, seeking the ‘best arguments’ for a given case. And panoramic views were nowhere to be found.

Let us pause for a moment to admire the sophistication of what Damaška had to say in this lecture. There are indeed many foreign visitors who experience the kind of astonishment that Damaška describes. I have encountered quite a few, and I can report that most of them, unlike Damaška, simply take the unsympathetic view that American law is primitive. Indeed there are some of them who believe, to return to the passage of Brian Bix quoted above, that American law cannot *really* count as ‘legal’ system. Such visitors might perhaps admit that American law has an ‘argumentative’ commitment to finding correct answers, but they are baffled, if not appalled, by the American lack of interest in establishing definitive ones. Damaška, by contrast, came to his lecture with an open mind about American approaches. Moreover, his account of Continental law stands out for its adroitness. He acknowledged that Continental law

²¹ *Ibid* 1365–66.

²² *Ibid* 1364.

²³ *Ibid* 1367.

²⁴ *Ibid* 1365.

sought answers that were ‘right’ in the sense that they were both definitive and correct. But he did not defend the naive idea that it is actually possible to arrive at such answers. Instead, he spoke of Continental law, not as *finding* definitive correct answers in fact, but as having a ‘grammar,’ a coherent method for *seeking* such answers. And he was careful only to describe the Continental tradition as committed to the proposition that the ‘twilight zone’ of concepts could be ‘somewhat reduced.’

At any rate, what Damaška identified in his 1968 lecture as a key theme in comparative law has since captured the attention a number of fine scholars, who have shown that the fundamental contrast described by Damaška can be detected in a wide range of differences, both substantive and procedural, between the Continental and the Anglo-American traditions. Let me now turn to some of their observations, before adding some of my own.

Robert Kagan, for example, in a book that exploits a large literature of sociological studies, reviews numerous aspects of the American pattern. Kagan’s book grew out of a comparative study of harbour management in Oakland and Rotterdam. In the course of that study, Kagan conducted numerous interviews that revealed that parties involved in the business of these two harbors routinely found American law more unpredictable than Dutch law, and he made unpredictability a recurrent theme of his book. In one typically elegant passage, Kagan offered the following observations after discussing the bizarre litigation between Pennzoil and Texaco, which resulted in a multi-billion dollar judgment entirely unforeseen by Texaco’s counsel:

How could a sophisticated company such as Texaco, with its cadre of experienced attorneys and investment bankers, fail by such a wide margin to discern the legal risks to which it was exposed? The answer is that in the decentralised American legal system, constantly being shaped and reshaped by adversarial argument, the legal terrain is often unstable; the ostensibly solid path mapped by one’s lawyer can suddenly turn to quicksand. This is not an endemic feature of all legal regimes. When asked about transatlantic cargo damage disputes that reach adjudication, the shipping line and insurance firm representatives whom I interviewed all asserted that results in the courts in Rotterdam are far more predictable than when the litigation occurs in the United States.²⁵

Like Damaška, let us note, Kagan thus sees American law as characterised by adversarial ‘argument’ rather than by a commitment to the quest for right answers. ‘In both kinds of legal systems [that is US and European],’ Kagan observes at another point, echoing Damaška’s account of Europe,

²⁵ R Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Harvard University Press, 2001) 110–111.

'pre-trial settlements occur "in the shadow of the law." But the greater predictability of European adjudication means that the boundary of the shadow is far clearer.'²⁶

The boundary of the shadow is clearer in Europe. Europeans are not utter juridical naïfs. They know that not all legal questions can be settled easily and in advance. But they have not abandoned the effort to build systems that seek definitive answers; they are far more committed than Americans to minimising uncertainty to the extent possible; and comparative studies seem to show that they have succeeded. This is an observation that can be made consistently over a wide range of areas of the law. Take the case of divorce, an example highlighted by Kagan. A pair of studies published in 1986, by John Griffiths and Austin Sarat and William Felstiner, revealed striking differences between the Netherlands and the United States. Divorce lawyers in the United States, as anybody who has been involved in a divorce of any complexity knows, advise their clients that the results of the litigation will depend on which judge hears the case. American divorce is a world of extreme judicial discretion. Felstiner and Sarat describe the resulting attitude of American lawyers:

For lawyers, legal justice is situational and outcomes are often unpredictable ... Lawyers are intimately familiar with the human dimensions of the legal process. They know that in most instances the process is not rule governed, that there is widespread use of discretion, and that decisions are influenced by matters extraneous to legal doctrine.²⁷

Sarat and Felstiner further describe the consequent frustration and confusion of American clients: 'Where clients want predictions and certainty, lawyers introduce them to the frequently unpredictable reality of divorce.'²⁸ 'Unpredictable': the word appears again and again in studies of American law. Griffiths, on the other hand, portrays a Dutch system in which most issues are fairly settled, and in which lawyers serve as guides who lead their clients through a system that is, like all legal systems, complex, but that is also quite predictable to those know it. 'The standards by which [child] support is computed by the court,' he writes, for example,

are clear and detailed. The amount to be paid is therefore usually easy to determine for an expert who knows these standards.²⁹

In an area like divorce, we thus see that the comparatively open-ended character of American law can have a direct and powerful impact on the lives of ordinary litigants.

²⁶ *Ibid* 117.

²⁷ *Ibid* 126.

²⁸ *Ibid* 127.

²⁹ *Ibid* 140.

The same is true of other areas of law as well. Take one example of great importance to contemporary legal life: business contracts. It is a familiar fact of global law that American contracts are far longer and far more complex than contracts produced in countries like Germany or Japan.³⁰ A stimulating comparative law literature has grown up around this phenomenon, and several explanations have been offered. I will not explore all those explanations here, but at least one has to do with the same differences in the attitude toward right answers we see in so many areas of the law. We can think of a business contract as giving answers to the questions presented by a given transaction. The striking fact, as Hill and King note in a fine recent study, is that German contracts tend to give the same answer all the time, where American contracts are much more varied. In America ‘contracts of a particular type of transaction are similar in general coverage, but the specific language varies considerably from contract to contract’; whereas in Germany ‘many provisions are quite similar from contract to contract’.³¹ The consequence for parties to contracts is the same as the consequence for parties to so many other types of transactions: ‘Compared to US law, German law may yield more certain results in litigation.’³²

Continental law tends to give a single answer more consistently, and the result, as many scholars observe, is that Continental law is generally more predictable. In this we discover one of the ‘grand discriminants’ dividing American law from Continental.³³

Let me offer a few more examples, even if only in a cursory way, before turning to the significance of this grand discriminant for legal philosophy. The examples are many and varied – so many and so varied that it is clear that we are dealing with a deep-seated structural difference. The use of expert witnesses is one. On the Continent expert witnesses are appointed by the court, in the expectation that they will give the correct answer on the topic in question. In America by contrast we see the battle of experts offering arguments.³⁴ Federalism too offers examples of great interest for comparative law. The law in the fifty states of America often gives quite different answers to the most basic questions in the law. Yet Americans

³⁰ JH Langbein, ‘Comparative Civil Procedure and the Style of Complex Contracts’ (1987) 35 *American Journal of Comparative Law* 381; C Hill and C King, ‘How do German Contracts do as Much with Fewer Words’ (2004) 79 *Chicago-Kent Law Review* 889; DH Foote, ‘Evolution in the Concept of Contracts’ in V Kusuda-Smick (ed), *US/Japan Commercial Law and Trade* (Ardsley on Hudson, Transnational Juris Publications, 1990).

³¹ Hill and King, above n 30, at 894–895.

³² *Ibid* 892.

³³ For this famous phrase, B Kaplan, ‘An American Lawyer in the Queen’s Courts: Impressions of English Civil Procedure’ (1971) 69 *Michigan Law Review* 821, 841.

³⁴ Eg, M Reimann, ‘Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?’ (2003) 51 *American Journal of Comparative Law* 751, 826–828.

regard all of these different answers as equally valid American law, and efforts to regularise the law on a nationwide basis are quite unsuccessful. This may seem unsurprising to Americans. After all, the 50 states are 50 sovereign entities, even if federated. But it is striking that Continental Europeans do not view matters the same way. The European Union is a federation too. Certainly its member states are least as sovereign as the member states of the US. Yet it is a commonplace in contemporary Europe that a functioning federation *must* have a unified system of law, giving the same answer in every case and every place.³⁵ (Moreover many leading Continental jurists seem to believe that it is possible to provide the federation with answers that are both definitive and correct.)

Nor does the contrast end there. There is not even a fixed system of international private law in the United States. International private law – what we call ‘the conflict of laws’ – is a hopeless mess in my country. One might have imagined that a federation like ours, with its multiple legal systems, would have at least have developed a dependable doctrine of international private law. Nothing could be farther from the truth: Even in this regard the American system gives no definitive answer. At the same time, our law of jurisdiction permits litigants to file suit in the widest range of jurisdictions – while our corporate law permits firms to choose to incorporate in states with strikingly different corporate regimes. The result is a level of disorder that will often seem, to the Continental jurist, wholly medieval.

Our federal law, similarly, is remarkably varied, with many conflicts among the various circuits that go unresolved for decades. This is inevitable, because of a fact of great significance for comparative law: Our Supreme Court accepts a caseload far too small to permit it regularise jurisprudence on the federal level. The comparison with the French Cour de Cassation is particularly striking. The Cour de Cassation, committed to regularising jurisprudence throughout France, decides tens of thousands of cases each year.³⁶ The American Supreme Court, by contrast, which ‘took control’ of its caseload with the Judiciary Act 1925, issues a number of decisions that can only be called minuscule – far too few to regularise American federal jurisprudence.³⁷ As a result, important differences can persist for long stretches of time among the federal circuits. The Supreme Court may accept enough cases to engage in a quest for correct answers in a few isolated areas of the law, but it makes no meaningful effort to

³⁵ Eg, R Zimmermann, ‘Civil Code or Civil Law –Towards a New European Private Law’ (1994) 20 *Syracuse Journal of International Law and Commerce* 217.

³⁶ See <http://www.courdecassation.fr/IMG/File/pdf_2007/divers/plaquette_statistiques_2006.pdf> accessed 19 June 2008.

³⁷ Eg, A Hellman, ‘The Shrunken Docket of the Rehnquist Court’ (1996) *Supreme Court Review* 403.

guarantee definitive answers over the broader legal landscape. Thousands of flowers bloom in the law of the United States. The many federal circuits, like the many states, routinely give different answers to the same questions, and all of their answers are regarded as perfectly valid, or at least un-policeable in their variety.

It is almost needless to remark that the basic forms of judicial decision-making show much the same pattern. American judges render ‘opinions’ – a very strange term from the French point of view, as Antoine Garapon and Ioannis Papadopoulos observe.³⁸ Moreover, American judges have a tradition of publishing their dissents in a way that was once deemed completely *outré* on the Continent. Dissents have made some headway in European constitutional law in recent years, but the American culture of dissent has hardly conquered Europe yet. Different American judges cheerfully deliver clashing ‘opinions’ on questions of law, and lawyers often refer to what judges decide as their ‘arguments.’ The American Supreme Court, not least, presents what can seem a spectacle of stunning lawlessness to outsiders, as lawyers make plays for the votes of the justices, trying to ‘get to five.’ To the Continental eye this of course looks like a baffling, not to say disturbing, acceptance of a rule of men rather than a rule of law – rather like the American system of divorce law. Regularisation of decisionmaking at the first instance is made extraordinarily difficult by the system of jury trial, with its unreviewable fact-finding, and by the use of the ‘clearly erroneous’ and ‘abuse of discretion’ standards in reviewing judicial determinations. And on it goes.

At the same time, our basic approach to jurisprudence makes it quite impossible to give what Damaška called the ‘panoramic view.’ The American common law often looks a caricature of the common law tradition, and this is also true of our jurisprudence. American courts take the case-law approach utterly seriously: We are trained to decide the case before us using the most minimal possible jurisprudential means. This tradition of judicial minimalism has produced, for example, the Ashwander doctrine in American constitutional law, which enjoins courts to avoid reaching constitutional questions if at all possible.³⁹ The consequence of this American minimalism is that courts scrupulously avoid exploring all the issues presented by any particular area of law. Indeed, it is common for our Supreme Court to ‘reserve’ questions – that is, to refuse expressly to decide important questions raised by the case before the Court. Because of our minimalism, American courts never give a full conspectus of any area

³⁸ A. Garapon and I. Papadopoulos, *Juger en Amérique et en France* (Paris, Odile Jacob, 2003) 199–226.

³⁹ *Ashwander v TVA*, 297 US 288, 347 (1936) (Brandeis J, concurring).

of law.⁴⁰ Meanwhile American scholars devote themselves primarily to various forms of inventive law-and scholarship: law-and-economics, law-and-history, what have you. The great majority of American law professors, at least during the last 20 or 30 years, have even less interest in systematic investigation of the law than American courts do.

In all these respects, American law seems never to have embraced the core Continental commitment to creating a form of rule of law based on the pursuit of certainty to the extent humanly possible. In criminal law in particular, that core Continental commitment goes by a name, the name of ‘legality,’ and I would like to close this section by speaking for a moment about the concept of legality and what it implies. Americans have a concept called ‘legality,’ which at first glance looks little different from what we find on the Continent. It holds that criminal liability and punishment can only be imposed on the basis of a clear legislative prohibition.⁴¹ But in practice, the Continental approach differs dramatically from the American, in ways that reveal the powerful grip of the right answer mentality in the Continental world.

The Continental concept of ‘legality’ derives from the familiar Latin maxim *nulla poena, nullum crimen, sine lege*.⁴² In modern times this principle of legality is said to have two basic implications: a ban on retroactivity and a requirement of maximal certainty. The fundamental idea of legality can be found in Article 8 of the Declaration of the Rights of Man and the Citizen 1789: ‘*La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée.*’ Its current form can be found, for example, in the 1983 European Court of Human Rights decision in *Silver v United Kingdom*:

a norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

These statements may seem unexceptionable to most Americans. Do they not correspond to what we think of as legality too? Nevertheless, in Europe they are taken to imply legal prescriptions unimaginable in the United States.

The most important of these have to do with prosecutors. Prosecutors seem like threatening figures to Europeans in a way that is not the case in America. In the United States we tend to think of the arbitrariness of

⁴⁰ C Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Harvard University Press, 1999).

⁴¹ PH Robinson, *Criminal Law* (New York, Aspen Law & Business, 1997) § 2.2, 74–75.

⁴² For the long history, reaching back to Antiquity, see V Krey, *Keine Strafe ohne Gesetz* (Berlin/New York, Gruyter, 1983).

judges as the main threat to rule of law: Most of our discussion of the risks of ‘rule of men’ as opposed to ‘rule of law’ in the United States, to the extent we discuss those risks, turn on the problems of judging. Not so in Europe. Europeans certainly regard judicial arbitrariness as a danger. Indeed, by contrast with Americans they can seem obsessed with the danger. But in sharp contrast to Americans, they regard prosecutorial arbitrariness as dangerous too. (The contrast is particularly striking in light of the recent scandals involving the politicisation of the American prosecutorial corps both on the state level in North Carolina and on the federal level). This has significant implications for Continental legality. The Continental concept of legality holds, in a way foreign to American practice, that prosecutors must determine the ‘correct’ charge in any given case. From the Continental point of view, the application of criminal law is only appropriate if proscribed behavior has been clearly defined in advance. By implication, the prosecutor, if his power is to be properly cabined, must be able to give a single right answer to the question: what clearly forbidden act has the accused committed? Continental legality holds that there must be, at least in principle, a right answer, and that prosecutors must therefore have no charging discretion.

Anglo-American criminal law, by contrast, has historically been entirely innocent of this Continental concept of legality. This has consequences of real importance for comparative law. To begin with, American prosecutors have the widest range of charging discretion. Indeed, they bring the same spirit of inventiveness to their task that American business lawyers bring to the drafting of contracts. The fact that American prosecutors have this inventive discretion is immensely important – particularly when it comes to the practice of American plea bargaining, which notoriously involves charge bargaining rather than sentence bargaining. Indeed, these differences in plea bargaining have become the subject of one most fertile sub-literatures in comparative law – and the subject of one of the great political debates on the global legal scene as well.⁴³

Another consequence of the historic difference in concepts of legality is being felt in contemporary England. England faces considerable difficulties, here as elsewhere, under the Human Rights Act 1998: English criminal law must deal with Continental concepts of ‘legality’ and ‘certainty’ that have no place in its jurisprudence. English criminal prohibitions are framed in language that fails to meet the Continental test of certainty, and as a result

⁴³ See generally M Langer, ‘From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure’ (2004) 45 *Harvard International Law Journal* 1–64; J Ross, ‘Criminal Law and Procedure: The Entrenched Position of Plea Bargaining in United States Legal Practice’ (2006) 54 *American Journal of Comparative Law* 717.

England is facing the possible task of producing an entirely new criminal code divorced from its common law traditions.⁴⁴

IV. CONCLUSION

Further detailed examples could be given, but for now I would like to turn to larger questions of interpretation. What should we say about these consistent and wide-ranging differences in attitude toward the pursuit of right answers? One's first temptation in surveying all of this is to ask which of the two approaches is better. Continentals will tend to deplore American law as verging on lawlessness. Americans will tend to dismiss the Continental approach as naïve in its efforts to minimise discretion, and poorly attuned to the economic and social values inherent in letting parties craft their own agreements and settle their own disputes. Each side is likely to exaggerate the failings of the other. My view is that there are advantages and dangers in both. The Continental tradition does provide more certainty, which makes for a more comfortable experience for most litigants, since it shields them from much litigation risk. The Continental approach also contributes to the making of a more humane criminal law. The American tradition, by contrast, requires litigants to accept more risk, just as American life generally requires individuals to accept more risk than individuals do in northern Continental Europe. This is difficult for many people, but it probably permits more innovation and encourages a culture of individual autonomy.

But asking which is the better approach is not the only, or even the best, way to do comparative law. Far-reaching change is not likely on either side of the Atlantic. People in both worlds are much too deeply attached to their way of doing things. We all resist radical critiques of the basic value commitments of our legal traditions; and the differences I have traced in the comparative law of right answers are, in my view, differences in basic value commitments. That is to say, they are not merely ‘functional’ differences – differences between ‘better’ and ‘worse’ methods chosen to achieve a goal shared by actors in all legal systems.⁴⁵ They are differences that have to do with fundamental differences in attitude toward questions like the primacy of individual autonomy or the imperative of reducing risk in everyday life. They are differences that grow, not out of different approaches to solving the technical problems of the law, but out of more fundamentally disparate perceptions of what matters in the world.

⁴⁴ A Ashworth, ‘Human Rights, Criminal Law, and the Principles of Legal Certainty and Non-Retrospectivity’ in J Arnold *et al* (eds) *Menschengerechtes Strafrecht. FS für Albin Eser zum 70. Geburtstag* (Munich, Beck, 2005) 48–59.

⁴⁵ See the classic discussion of K Zweigert and H Kötz, T Weir (trans), *Introduction to Comparative Law*, (Oxford, Clarendon Press, 1992).

How can we explain the fact that such disparities in basic values divide countries of the Atlantic world? Let me assert as forcefully as possible that the disparities in question are not the product of differences in philosophical analysis of the no-right-answer problem. It is not that Americans have engaged in careful collective reflection over the place of definitive answers in the legal system, weighed the pros and cons, and opted for a maximally open-ended approach. Most American lawyers are utterly unselfconscious about this aspect of their law. Nor is it that Continentals have carefully weighed the pros and cons. Jurists who work in the Continental tradition are certainly the beneficiaries of a superb intellectual tradition, but (contrary to what my friend Bill Ewald has claimed⁴⁶) they do not translate the lessons of philosophy directly into law. Like lawyers everywhere, they spend their time patiently working out the technical legal implications of deeply held, but poorly articulated, beliefs. The only possible explanations for our differences in law have to do with differences in culture, history and social traditions.

So what are the differences in culture, history and social traditions that account for the contrast between American and the Continent? Damaška gave us the single finest answer we possess in his 1986 masterpiece *The Faces of Justice and State Authority*, which famously traced a remarkable range of differences in procedure and legal reasoning to differences in the structure of authority. As Damaška argued, America was characterised by ‘co-ordinate’ authority, while the Continent was relatively more ‘hierarchical.’ This had fundamental implications for the shape of legal reasoning. In a hierarchical system, oriented toward the supervision and control of the behavior of lower-ranking officials by higher-ranking ones, it is essential that the law give a definitive answer to the extent possible. If it fails to do so, the work of lower-ranking officials can not be verified and corrected by their superiors.⁴⁷ On this view, the Continental tendency to embrace a single answer has little or nothing to do with the lessons of philosophy. Indeed, the lessons of philosophy would suggest that the hunt for definitive answers is fated to fail. Instead, it has to with a culture of distrust of lower-level officials. It is part and parcel of the Continental tradition of legality, founded not so much on any particular conception of law, but on an extreme suspiciousness toward anything that smacks of the rule of men. American law, by contrast, with its weak hierarchical controls and wide-ranging discretion for trial-level judges and juries, is not the product of a comparable culture of distrust. It is the product of a world that accepts a wide diffusion of authority among legal officials. The forms of legal

⁴⁶ W Ewald, ‘Comparative Jurisprudence: What Was it Like to Try a Rat?’ (1995) 1995 *University of Pennsylvania Law Review* 1889.

⁴⁷ M Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, Yale University Press, 1986) 54–56.

reasoning are thus derivative of the structure of authority in the societies that Damaška considered, so he argued.⁴⁸

Now, Damaška's account deserves, and needs, to be both expanded and supplemented. First, it is important to remind Continentals that the open-ended character of American law that he described so well is not unique to America. On the contrary, it is typical of many world systems, especially those that take the form of a *Juristenrecht*. Classical Roman law, for example, did not give a single definitive answer. All the evidence we have shows the classical jurists expressed differing, and sometimes sharply differing, opinions on questions of law. Like the judges of modern America, the classical Roman jurists seemed to have functioned without significant hierarchical oversight, despite what may have been efforts by the Emperor Augustus to restrict opinion-giving to officially sanctioned jurists.⁴⁹ The same is true of Talmudic law, and perhaps most notably of classical Islamic law, which is marked by a powerful resistance to the notion that definitive answers can be dictated by any supreme human hierarchical authority.⁵⁰ Indeed, Continental law is arguably quite exceptional in insisting on definitive answers. That does not mean that there are no parallels to the Continental pattern. Imperial Chinese law may be one. At any rate, Damaška's analysis can be applied revealingly well beyond the US/Continental contrast that was his subject in *The Faces of Justice*.

Still, revealing though it is, Damaška's analysis does leave some questions unanswered. Damaška leaves us wondering why the United States shows a co-ordinate pattern while the Continent shows a hierarchical one. In some sense, the answer is easy: We all know that relatively strong resistance to hierarchical forms of authority has been a recurrent theme of American history. Nevertheless, one wants more. There are also other factors that deserve more discussion, some of them mentioned by Damaška, some not. The more orderly and 'scientific' Continental approach is the product of a legal tradition that emerged in the medieval universities, while the English common law established itself in the universities only much later. This is a fact of obvious importance for explaining the contrast between the Continent and the Anglo-American world. Perhaps the importance of

⁴⁸ The importance of trust and distrust in the structure of legal reasoning is the subject of Scott Shapiro's forthcoming book, *Legality*.

⁴⁹ See now the excellent account of K Tuori, *Ancient Roman Lawyers and Modern Legal Ideals*, (Helsinki, University of Helsinki Printing House, 2006) 101–84.

⁵⁰ For the 'questioning, pluralistic' structure of Talmud, see, eg, B Lifshitz, 'The Age of the Talmud' in NS Hecht, BS Jackson, SM Passaneck, D Piatelli and AM Rabello (eds), *An Introduction to the History and Sources of Jewish Law* (Oxford: Clarendon Press, 1996), 179. For Islamic law, see, eg, Abou El-Fadl, *The Authoritative and the Authoritarian*, above n 6.

universities in the making of Continental law has some relation to the hierarchical character of authority Damaška describes, but it is not entirely obvious what that relation might be.

Damaška hints that he thinks differences in religious traditions play a role too. In the American pattern he detects the strength of Protestant tradition that lays all the weight on the conscientious decision-making of individuals.⁵¹ Presumably he sees the Continental tradition as more Catholic. I think this explanation is problematic, but one does want to hear more about it. Is it possible that the Continental commitment to right answers is the intellectual offspring of some Christian idea of orthodoxy? After all, Christianity is nearly unique among world religions in its commitment to policing belief.⁵² Perhaps the Continental jurists are the inheritors of a Catholic version of the ancient feature of Christianity. As I have indicated, I also believe that there are differences in the attitude toward individual autonomy that may deserve more attention.

But all this amounts to no more than quibbling over how to characterise the basic values at stake. What matters, as Damaška rightly insisted in *The Faces of Justice*, is that there is no way to explain the comparative differences we discover without acknowledging how much the law is shaped by what are often poorly articulated value commitments – and without acknowledging that those value commitments differ from society to society.

Surely it is those value commitments that must be the topic of any ultimately persuasive legal philosophy of right answers. Surely we must recognise that people do not philosophise carefully about their law, and that therefore careful philosophy cannot offer us full descriptions of how the law works. Of course Brian Bix can not imagine how the position ‘might be justified’ that

systems ... that are structured in such a way that there are *not* always unique correct answers to legal problems, are not ‘really’ legal systems.

From the point of view of careful philosophy, such a position cannot be justified. And yet Continental legal systems seem to reflect some level of commitment to exactly that proposition.

Lawyers do not think philosophically, and they do not so for the simple reason that law is not philosophy. Instead it is an effort to remain faithful to certain dearly held values, even when there is no perfectly persuasive or philosophically cogent way of doing so. I think comparative law forces us to recognise that legal systems are value systems of that sort. Of course, to say law is not philosophy is not to insinuate that the philosophers have all

⁵¹ Damaška, above n 47, at 19.

⁵² R MacMullen, *Christianity and Paganism in the Fourth to Eighth Centuries* (New Haven, Yale University Press, 1997).

gotten it wrong. On the contrary, I imagine that Dworkin too conceives of the enterprise of the law as an effort to work out the consequences of basic value commitments. Nevertheless even Dworkin, like so many other philosophers, seems, to the eye of the comparative lawyer, all too obviously the product of the values of his own legal culture. The picture that Dworkin paints – the picture of a law that seeks correct answers, but not definitive ones – is, after all, manifestly the picture of *American* law. The broader picture is one that the philosophers have yet to offer us.