CULTURAL CHAUVINISM IN COMPARATIVE LAW

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Over the past generation Americans have forged a powerful consensus in our public and social life against stereotyping people based upon race, faith, gender, sexual orientation, ethnic origin, and the like. Having grown up in the American South in the 1940's and 1950's, I shiver to recall the macabre world of "white" and "colored" drinking fountains and state-enforced school segregation through which I passed. Schoolyard humor centered on ethnic slurs; Polish jokes were particular favorites. Still in my day as a law student, *The New York Times* classified its help wanted columns by gender.

Happily, my children are growing up in a society that is bent on casting off ethnic and other stereotyping. The message for today's youth is that neither race nor gender nor ethnic origin defines or limits human potential. Women can be firefighters or physicians; recently, a Polish American succeeded an African American as leader of the armed forces.

It is odd, therefore, to find Oscar Chase in the pages of this journal[1] telling on the Americans what amounts to the Polish joke of comparative law. The Americans, he says, are so defectively endowed, so culturally impaired, that they cannot learn from the stunning success of other systems of civil justice. Chase's essay is directed at (or more precisely, directed to evading the import of) an article that I published a decade ago, *The German Advantage in Civil Procedure*.[2] Basing himself upon tired ethnic stereotypes about the individualism of Americans and the authoritarianism of Germans, Chase says that the disgraceful, truth-defeating excesses of adversary civil procedure in the United States deserve immunity from a critique that is based upon comparative example. He asserts that our litigation mess embodies our culture, hence that we

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1 Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1 (1997).

2 John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) [hereinafter *The German Advantage*].

cannot learn from the superior civil justice systems elsewhere. He is wrong.

I. THE GERMAN ADVANTAGE

The critique of contemporary American civil procedure that I voiced in *The German Advantage* focuses on the shortcomings that inhere in our adversary procedure on account of the power that we allow partisan lawyers to exercise over the fact-gathering and fact-adducing work of the legal system. The article contrasts the Continental tradition in civil procedure, exemplified in the system that I know reasonably well, the German. The theme of the article, whose detail I cannot reproduce here, is that German civil procedure strikes a better balance between lawyerly and judicial responsibility in the conduct of civil justice.

Witnesses. I spoke of the truth-distorting American practice of allowing the parties' lawyers to engage in pretrial preparation (coaching) of witnesses. And I pointed to the "bullying and other truth-defeating stratagems"[3] associated with cross-examination at trial. I contrasted American practice with the German rule forbidding lawyers for the parties to engage in pretrial communication with nonparty witnesses.

I observed that when the Continental civil procedural tradition assigns courts rather than lawyers to lead the investigation in matters of fact, it is doing nothing more than what Americans do when they need to investigate matters of fact in their ordinary business or personal affairs. The idea is that the decision-maker should ask his or her own questions, rather than sit idly while opposing adversaries engage in partisan examination and cross-examination. I also applauded the tension-free, conversational style in which German judges examine witnesses at trial, allowing witnesses to tell their stories in their own words.

In German practice there is no distinction between pretrial and trial. The court gathers evidence over the course of as many hearings as it finds necessary. Our system of party appropriation of witnesses (plaintiff's and defendant's witnesses) is unknown. All witnesses are the court's, called by the court in aid of the court's investigation into the truth of the parties' allegations. The parties' lawyers nominate witnesses, and otherwise guide and oversee the work of the court, but the court bears an independent responsibil-

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[3] *Id.* at 833.

ity for seeking the truth. The parties' lawyers advise the court what they want the court to investigate, and they may supplement the court's questioning of witnesses if they wish.

By comparison with American practice, in which witnesses are prepared (coached), then deposed in pretrial, then prepared (coached) for trial, and then examined and cross-examined at trial, the German system exhibits two central virtues, economy and accuracy. German procedure investigates once what we do in four or five repetitive installments. Further, by entrusting the main work of examining witnesses and investigating other sources of evidence to neutral experts whose job is to establish the truth, the Germans escape the corrosive partisan bias that taints our fact-gathering process. They know better than to put the adversaries, whose interest is often to bend or to suppress the truth, in charge of fact-gathering.

Experts. The ever-greater complexity of technology and business practice in modern commercial life has made it harder for courts to master the factual issues that arise in the most demanding civil lawsuits. The natural step when a decision maker such as a court lacks internal expertise is to seek expertise outside. I emphasized in *The German Advantage* the superiority of the Continental arrangements for making expertise available to the courts. I reported the disbelief that European jurists commonly express when they learn that in American civil practice the parties' lawyers select and prepare opposing experts. I explained in detail how "[i]n the Continental tradition experts are selected and commissioned by the court, although with great attention to safeguarding party interests."[4] I contrasted the American battle of litigation-biased experts, which "leads to a systematic distrust and devaluation of expertise."[5]

Eliminating needless search. In its trial phase, American civil procedure employs a relatively continuous or uninterrupted proceeding. This trait is known in the literature of comparative law as the principle of the concentrated trial.[6] In order to prepare for the concentrated trial, we have had to devise a pretrial discovery sys-

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[4] *Id.* at 835.

[5] *Id.* at 836.

[6] *E.g.,* Arthur T. von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks, in* 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING ZUM 70. GEBURTSTAG 361-71 (Norbert Horn ed., 1982).

tem. Our pretrial process has grown increasingly onerous and expensive. As I explained in *The German Advantage*, "we have to discover for the entire case. We investigate everything that could possibly come up at trial, because once we enter trial we can seldom go back and search for further evidence."[7]

In German procedure, by contrast, the court can investigate and adjudicate in phases, confining the inquiry only to the minimum necessary to resolve the case. The German court "ranges over the entire case, constantly looking for the jugular — for the issue of law or fact that might dispose of the case" guided by counsel, who direct "the court's attention to particularly cogent lines of inquiry."[8] Fact-gathering is done only when and if it is really needed.

Restraining judicial power. The German Advantage describes the thick web of safeguards that protects litigants against the danger of judicial arbitrariness, eccentricity, bias, or incompetence within this judicially-administered system of fact-gathering. An elaborate incentive structure is designed to reward members of the German career judiciary for diligence and to deter them from abuse. Further, a far-reaching system of appellate review subjects German trial courts to constant oversight.[9] In truth, an arbitrary trial judge is much more dangerous in the United States than in Germany, on account of the presumption of correctness that attaches in our system to the conduct of the pretrial and the trial, as well as to the judge's findings of fact. In German practice, the first level of appellate review (*Berufung*) is review de novo, with no presumption of correctness.

II. Avoiding the Issues

Oscar Chase's critique of *The German Advantage* is as remarkable for what it does not say as for what it does. Chase does not engage *The German Advantage* on the merits. He makes no argument in support of having lawyers coach witnesses. He does not defend the abusive cross-examination and other truth-defeating courtroom antics that so often disgrace the American trial bar. He voices no praise for litigation-biased experts. He offers no justification for the wasteful juggernaut of American pretrial discov-

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7 Langbein, *supra* note 2, at 831.

8 *Id.* at 830.

9 *Id.* at 848-57.

ery. He does not take issue with my account of the extensive constraints on judicial power that the Germans achieve through the incentive structure of their career judiciary and their tradition of routinized appellate review.

Accordingly, Chase's critique effectively concedes the merits by default. He has no answer to the claim demonstrated in such detail in *The German Advantage* that German civil justice operates with superior efficiency, accuracy, and fairness. What his argument boils down to is the claim that we Americans cannot aspire to such improvements because we are Americans and they are Germans. Chase writes that, for "individualistic Americans," German civil procedure would entail a "poor cultural fit."[10] Enhancing the responsibility of the judge for fact-gathering, which is the central institutional adjustment that enables Continental legal systems to avoid the partisan excesses of American adversary procedure, is a choice that is foreclosed to Americans on account of "differences in national culture."[11]

Although Chase concedes that "in many important respects the United States and Germany share a common culture,"[12] he insists that German civil procedure depends upon "[t]he 'authoritarianism' of the German culture," a trait that "is so often remarked as to border on the platitudinous."[13] Hoping to bolster the platitude, Chase emphasizes his reading of one sociologist's cross-national survey of supposed cultural values, a study conducted a quarter of a century ago "through pencil and paper questionnaires administered to the employees of a large multi-national corporation" in 66 countries.[14] Chase admits that, "surprisingly," the survey responses found that "the U.S. and Germany both fell into the low end"[15] of the sociologist's "power distance index" scale for measuring cultural "acceptance of hierarchical authority structures."[16] Nevertheless, Chase manipulates the survey report to align it with the platitude, emphasizing that the survey found the Germans more prone than the Americans to something that the sociologist labelled "rule authoritarianism,"[17] that is, a tendency to value clar-

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10 *See* Chase, *supra* note 1, at 7-9.
11 *Id.* at 7.
12 *Id.*
13 *Id.*
14 *Id.* at 11, *citing* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES 11 (1980).
15 Chase, *supra* note 1, at 11.
16 *Id.*
17 *Id.* at 12-13.

ity and predictability in rules. Beneath the epithet "rule authoritarianism" is, of course, a value that American tradition has long admired. It is called the rule of law, and it is associated with a platitude about esteeming a government of laws, not of men.

III. Culture Is a Cop Out

I cautioned in *The German Advantage* against the kind of exercise that Chase's article exemplifies: "allow[ing] the cry of 'cultural differences' to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example."[18] There are two recurrent flaws in Chase's reasoning. He exaggerates the extent of cross-cultural differences in attitudes toward authority. Further, he does not carry his burden of proof on causation. He simply asserts, rather than demonstrates, that whatever cultural differences may exist suffice to explain or justify the tawdry excesses of the American adversary system.

The Continental advantage. In truth, the attributes of German civil justice emphasized in *The German Advantage* are far from being culture-specific. Rather, these characteristics are broadly shared among Continental legal systems. I took the German system as my subject for comparative study for a simple reason of convenience — it is the Continental system that I happen to be familiar with (mostly as a byproduct of having spent some student years in Germany doing research in legal history). Anyone conversant with, say, Danish, Dutch, or Swiss civil justice could have written a similar comparative critique of American civil procedure. Some details would differ, but all Continental systems share the attribute that Chase pretends is uniquely German and "authoritarian," that is, the greater responsibility of the judge for fact-gathering. Thus, Chase's contention that German civil procedure reflects a special German cultural predisposition toward authoritarianism is wholly misguided, since the rest of Europe adheres to the same principle that he ascribes to uniquely authoritarian German culture.

All advanced Western countries, including the United States, exhibit complex strands of individualism and authoritarianism. The German and American armed forces, for example, are equally authoritarian; privates obey generals. Germans and American pas-

[18] Langbein, *supra* note 2, at 855.

sengers are equally obedient to airline personnel when ordered to fasten their seat belts and behave like sardines for the duration of the flight. In my experience, Germans are more anarchic (individualistic) than Americans in highway driving, less so in pedestrian traffic.

Chase's stereotypes of authoritarianism and individualism lack consistency when tested against other countries. For example, in my field of law, trusts and estates, the English and Commonwealth legal systems are distinctive for the astonishing power (authoritarianism?) that they give to their judges to decide what shares of a decedent's estate to award the widow, the children, and others.[19] In American practice, by contrast, we follow strict forced share schemes ("rule authoritarianism"?) that deny the judge this authority.[20] Yet both the American and the English and Commonwealth systems share the essential elements of adversarial civil procedure. Thus, different attitudes toward empowering judges can be found in legal systems that share the Anglo-American procedural tradition. Similar contrasts are apparent in Continental countries. The Balkans and Italy have proven to be in many ways ungovernable (individualistic), yet they share versions of the sensible form of judicially directed fact-finding that Chase wants to link with authoritarianism.

Managerial judging. Chase's contrast between stereotypes of German tolerance for judicial authority and American aversion to judicial authority is further belied by the burgeoning trend in American judicial administration to so-called managerial judging. A high theme of recent American civil procedural scholarship is the recognition of the immense power over pretrial management that American judges have come to exercise, with scant safeguard for litigants.[21] If hostility to authoritarianism is, as Chase contends, the defining American cultural trait that precludes greater judicial responsibility for fact-gathering, he needs to explain why that cultural trait has been so recessive against the advance of managerial judging.

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19 John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB. & TR. J. 303, 313-14 (1987).

20 *Id.*

21 Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

Transplanting. In questioning the portability of basic legal institutions across legal systems and across cultures, Chase is revisiting one of the grand old topics of comparative law. Chase's treatment is, however, ignorant in the technical sense of the word "to ignore," because he neglects to engage with the literature of comparative law. In the present generation the leading scholarly treatment has been the series of books and articles by Alan Watson, centered on the saga of how and why classical Roman law has come to underlie so much of the private law of the modern world.[22] Watson has emphasized (in William Ewald's apt summary) "the extraordinary persistence, into the present day, of rules that were first struck upon by a leisured class of slave-holding Italian aristocrats — men . . . who have been dead for nearly two thousand years."[23] Watson directs us to the ease with which "legal rules can be transported from society to society," so that "the very same rules of contract can operate in the worlds of Julius Caesar . . . and of the twentieth-century welfare state."[24] Accordingly, it is important to bear in mind that the transplanting of legal institutions is a large topic, much ventilated in comparative scholarship. An author who disdains the relevant literature in order to rely upon one supposed sociological survey is not likely to have done much justice to the subject.

IV. CONCLUSION

Americans operate a system of civil procedure whose excesses make it a laughing stock to the rest of the civilized world. Our system is truth-defeating, expensive, and capricious — a lawyers' tax on the productive sector. Some Americans do not want to admit the dimensions of our failure in civil justice. Powerful vested interests, especially at the trial bar, thrive from this dysfunctional system. They do not want it subjected to the searching critique that results from comparative study. Cultural chauvinism — the claim that cultural differences prevent us from adopting and adapting the superior procedural devices of other legal systems — is an effort to

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22 *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed., 1993); *see also* ALAN WATSON, THE EVOLUTION OF LAW (1985). For an insightful account of the issues arising from Watson's work, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 489-90 n.1 (1995) (Ewald collects citations to Watson's vast *oeuvre*).

23 Ewald, *supra* note 22, at 490.

24 *Id.* (continuing to encapsulate Watson's work).

switch off the searchlight of comparative law. In truth, the cultural differences that touch on the basic choices in civil procedure are trivial. The real explanation for the tenacity of our deeply deficient system of civil justice is not culture, but a combination of inertia and the vested interests of those who profit from the status quo.