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American "Exceptionalism" and Comparative Procedure

INTRODUCTION

The relationship between a society's culture and its socially-approved means of dealing with disputes has intrigued procedural comparatists and social theorists for decades.[1] Notwithstanding wide acceptance that there is such a relationship, its relevance to pragmatic work of procedural reform remains controversial.[2] The importance of the issue has grown as the globalization of business and personal activity has created incentives to transplant or harmonize procedures across borders.[3] This trend is reflected, for example, in the ongoing American Law Institute project on Transnational Rules of Civil Procedure, which "endeavors to draft procedural rules that a country could adopt for adjudication of disputes arising from international transactions";[4] in the proposed Hague Convention on the En-

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1. See, e.g., Cappelletti, "Social and Political Aspects of Civil Procedure – Reforms and Trends in Western and Eastern Europe," 69 *Mich. L. Rev.* 847, 885-86 (quotes the eminent 19th Century Austrian proceduralist Franz Klein observing the connection of culture and procedure). See also Abel, "A Comparative Theory of Dispute Institutions in Society," *Law and Society Review* 217 (1973); Mirjan R. Damaška, *The Faces of Justice and State Authority* (1986); Damaška, "Rational and Irrational Proof Revisited," 5 *Cardozo J. Int'l and Comp. L.* 25 (1997); Felstiner, "Influences of Social Organization on Dispute Processing," 9 *Law and Society Review* 63 (1974); Laura Nader & Harry F. Todd, Jr. (eds.), *The Disputing Process – Law in Ten Societies* (1978); Katherine S. Newman, *Law and Economic Organization* (1983); Simon Roberts, *Order and Dispute* (1979). Taruffo, "Transcultural Dimensions of Civil Justice," XXIII *Comparative Law Review* 1 (2000).

2. E.g., Jackson, "Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on 'Legal Processes and National Culture'," 5 *Cardozo J. Int'l and Comp. L.* 51, 52-53 (1997).

3. For a through and insightful discussion of examples of relevant developments, see Gerhard Walter & Fridolin M.R. Walther, *International Litigation: Past Experiences and Future Perspectives* (2000). See also Taruffo, supra n. 1, at 14-18 (describes efforts to harmonize procedure).

4. Transnational Rules of Civil Procedure, Preliminary Draft No. 2 (The American Law Institute: Philadelphia, 2000) 2. See also Hazard, Jr. & Taruffo, "Transnational Rules of Civil Procedure," 30 *Cornell Int'l L.J.* 493 (1997).

forcement of Judgments;[5] and in the effort to harmonize the litigation rules of the member states of the European Union.[6]

I have argued in previous papers that the transplantation of procedures from one society to another raises an issue even more important than the instrumental question of whether the borrowed approach will work in a new setting: How will the new procedures impact on the society that adopts them?[7] What broader cultural changes – for good or ill – may be set in motion? Underlying these concerns are the subsidiary claims that (1) the formal procedures of dispute resolution found in any culture reflect and express its metaphysics and its values; and (2) dispute procedures, because they are so public, dramatic, and repetitive, are in turn one of the processes (rituals, if you will) by which social values and understandings are communicated and are therefore critical to the ongoing job of transmitting and maintaining culture. In this essay I focus on only the first of these claims i.e., that court procedures reflect the fundamental values, sensibilities and beliefs (the "culture") of the collectivity that employs them. Using the United States as the case in point I show how the well-documented idiosyncrasies of American culture are reflected in the procedural rules that govern civil litigation.

Of course, most disputes that arise in any society are not handled through the court system; even significant controversies may be settled through arbitration, mediation or bargaining. Focus on the "official" rules of disputing is nonetheless justified because most important disputes are still brought to court and because the "official" status of these rules reflects the sense that they are the right way to proceed when significant matter are at stake and cannot be worked out privately.

My use of "culture" as an explanatory variable is no doubt controversial. The term needs defining and some defending as well. "Constructing a definition for anthropology's core concept has always been difficult, but at no time more so than the present."[8] The principal difficulties spring from the inherent vagueness of the concept, its potentially misleading message of immutability of practice and belief, and its failure to acknowledge individual departures from, and even opposition to, a social orthodoxy. But these problems do not trump the utility of the concept of culture as a short-hand way of acknowl-

5. The proposal is discussed in Pfund, "The Project on the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and Recognition/Enforcement of Judgments in Civil and Commercial Matter," 24 *Brooklyn J. Int'l L.* 7 (1998)(part of a symposium on the proposed convention).

6. This project is described and discussed in Walter & Walther, supra n. 3, at 33-34.

7. Chase, "Culture and Disputing," 7 *Tul. J. Int'l & Comp. L.* 81 (1999); Chase, "Legal Processes and National Culture," 5 *Cardozo J. Int'l & Comp. L.* 1 (1997).

8. Engle Merry, "Law, Culture and Cultural Appropriation," 10 *Yale J. L. & Human.* 575, 579 (1998).

edging commonalities in practices, values, symbols and beliefs of groups of people that form some sort of collectivity. I agree with Amsterdam and Bruner: "We seem to need a notion of culture that appreciates its integrity as a composite – as a system in tension unique to a people not in perpetuity but at a time and place."[9] I embrace the concept of culture that entails commonalities that persist over time but are hardly eternal and that are shared across a group but hardly unanimous.

The main features of official American-style disputing – the reliance on formal rules of law as the applicable norms, and reliance on sensory evidence as a source of fact, are shared by all the nations whose intellectual roots are in the Enlightenment.[10] For want of a better term I will call these "modern" systems. The connection between culture and procedures is obvious when we juxtapose modern systems with those societies that rely on faith-based methods of obtaining truth, such as oracles or ordeal.[11] But I want to make a more difficult point – that distinctions in disputing even among modern states are traceable to underlying cultural differences. In sum, I want to emphasize the differences between disputing in the United States and in other modern systems, and to show the cultural origins of those differences.

Anticipating one line of objection to this argument, I maintain that the well-recognized differences between litigation in the U.S. and elsewhere are not wholly, or even predominantly, a matter of "legal culture" as opposed to a national culture, i.e., a set of values and understandings generally shared by the population that constitutes the nation.[12] I do not deny that the professional corps of lawyers and judges that operate the legal system have much more influence over its practices than the layman, nor that they create practices that reflect their interests and professionalization. Their parochialism is, however, restrained by the parameters imposed by the people subject to and served by the system, at least in any democratic state. Further, the professionals are themselves a product of the same culture and cannot readily escape its basic values and beliefs. If this essay is

9. Anthony G. Amsterdam & Jerome S. Bruner, *Minding the Law* 231 (2000). The authors adopt a view of culture that combines "social-institutional" and the "intepretive-constructivist" conceptions of culture. "The former serves to mark the importance of the forms of institutionalization and legitimation that all societies require for the establishment and maintenance of canonicity; the latter highlights the ubiquitous pressure exerted by both solitary and communal possible-world construction on institutionalized canonicity." Id.

10. This theme is explored in *Rational and Irrational*, supra n. 1, at 25.

11. See my discussion of the use of oracles by the Azande (a people of central Africa) in Chase, supra n. 7.

12. The argument that legal culture is distinct from national culture is presented in, e.g., Jackson, supra n. 2, at 51, 53-57.

successful, it will help the reader come to the same conclusion by demonstrating the depth of the disputing-culture connection.

A description of the link between any culture and its way of disputing requires some description of those axes of the graph. I turn first to the salient features of American society. I will then show how those cultural predilections are reflected in four important aspects of civil procedure that are peculiarly American: the civil jury; party-dominated pre-trial discovery; the passive judge; and party-chosen experts.

American Culture

American "exceptionalism" has been observed and remarked upon at least since Alexis de Tocqueville published his observations of American society over one hundred-fifty years ago. "Tocqueville is the first to refer the United States as exceptional – that is, qualitatively different from all other countries."[13] The qualities that struck Tocqueville, such as individualism, egalitarianism, and a readiness to pursue disputes through litigation have persisted over time and been observed by other students of society. A leading modern proponent of the "America as unique" thesis is Seymour Martin Lipset, who recently developed his argument in American Exceptionalism: A Double Edged Sword.[14] Because Lipset so successfully captures this standard description of American culture I will center my discussion of it around his work, but the reader should keep in mind that Lipset is only one of many scholars who have identified similar American characteristics.[15]

Lipset describes the societal and institutional manifestations of distinctive American values, reports modern survey results that show the continued strength of those values, and provides an account of their sources. While the exceptionalism thesis has not gone unchallenged,[16] and while "[s]keptics may remain unconvinced," Lipset's argument "certainly is compelling and is backed up by a very wide range of survey data and examples."[17] As we shall see when I later turn to an account of its system of civil procedure in comparative per-

13. Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (1996) at 18. Even before Tocqueville, others had commented on particular distinctive aspects of American society. Lipset mentions Burke & Crevecouer, id. at 33-34.

14. See supra n. 13.

15. See, e.g., Jerold Auerbach, *Justice Without Law?* at 10 (describes to America as "a society where the dominant ethic is competitive individualism . . ."); Geert Hofstede, *Culture's Consequences* (1980) at 222; Robert N. Bellah et al, *Habits of the Heart – Individualism and Commitment in American Life* (1985) at 142; Lawrence M. Friedman, *The Republic of Choice, – Law, Authority, and Culture* (1990) at 27-35.

16. See, e.g., Gerber, "Shifting Perspectives on Americans Exceptionalism: Recent Literature on American Labor Relations and Labor Politics," 31 *J. Am. Stud.* (1997) 253, and authorities collected at id., n.1.

17. Verba, "Review, American Exceptionalism: A Double Edged Sword," 91 *Am. Pol. Sci. Rev.* 192, 193 (1997).

spective, American disputing provides another instance of its exceptionalism and is consistent with Lipset's description.

According to Lipset, America's "ideology can be described in five words: liberty, egalitarianism, individualism, populism, and laissez-faire."[18] As Lipset notes, egalitarianism in the United States "involves equality of opportunity and respect, not of result or condition."[19] Thus, American egalitarianism is consistent with individualism and laissez-faire.[20] "The emphasis in the American value system, in the American creed, has been on the individual."[21] It is the emphasis on the individual as a person equal in status to all other countrymen that produces populism, rights-orientation and laissez-faire (or anti-statist) attitudes.

Lipset argues that these values explain many distinctive features of American society, including some that are far from admirable, such as high crime rates. More ambiguous effects are those seen in the nature of governmental institutions and practices. He notes the relative weakness of the American central government and its modest involvement in the economy. The Constitution, he observes, "established a divided form of government . . . and reflected a deliberate decision by the country's founders to create a weak and internally conflicted political system."[22] Almost all other modern states have parliamentary systems under which the majority party exercises power that is virtually plenary. As Mirjan Damaška said about American government, "Most astonishing to a foreign eye is the continuing fragmentation and decentralization of authority."[23]

Individualism, liberty and laissez-faire values also explain the comparatively low levels of American economic and social regulation (except for the strangely co-existing Puritanism that explains sex and drug laws).[24] Meager American governmental support of welfare-state projects, be they cultural activities or universal health care – again typically laissez faire and individualist – is reflected even in constitutions. Many in Europe, but not the American, contain provisions that impose welfare-state obligations on the government.[25] According to Mary Ann Glendon, these constitutional differences "are

18. *American Exceptionalism*, at 33. See also Jacob, "Courts and Politics in the United States," in Herbert Jacob, Erhard Blankenburg, Herbert M. Kritzer, Doris Marie Provine, & Joseph Sanders (eds.), *Courts, Law, and Politics in Comparative Perspective* 16, 28 (1996) (the "widely held beliefs that affect the American legal system" are individualism, rights-orientation, and egalitarianism).

19. Id. at 19.

20. De Tocqueville also recognized the mutually supporting relationship between egalitarianism and individualism, see *Democracy in America* (1969) at 641.

21. Id. at 20. In addition to the sources cited by Lipset in support of the claim that American culture is more individualistic than others, see authorities cited at nn. 9-10.

22. Id. at 39.

23. *Faces of Justice*, at 233.

24. Id. at 58.

25. Id. at 22.

legal manifestations of divergent, and deeply rooted, cultural attitudes toward the state and its functions . . . continental Europeans today, whether of the right or the left, are much more likely than Americans to assume that governments have affirmative duties."[26] At the same time, the Bill of Rights incorporates the American ideal of a citizen as possessing the right to be "let alone" by government. As Jerold Auerbach has it, "Law has absorbed and strengthened the competitive, acquisitive values associated with American individualism and capitalism."[27] If this is true of law in general it is more so the case with dispute procedures in particular.

Since American values strongly influence its governmental arrangements, it would be odd if these same values did not also contribute to an American exceptionalism in disputing. "[D]ominant ideas about the role of government inform views on the purpose of justice, and the latter are relevant to the choice of many procedural arrangements. Because only some forms of justice fit specific purposes, only certain forms can be justified in terms of prevailing ideology."[28] Although Lipset does not discuss procedural details, he does connect values and the operation of the legal system. He notes, for example, that in the United States, judges are either elected or appointed by elected officials, whereas in most other countries judges are specially trained professional civil servants who enter the position through a competition and generally serve in the judiciary for their entire career.[29] The American approach (election or political appointment) is one of many manifestations of the populism that has its roots in the egalitarian ideal.

American individualism and egalitarianism, Lipset also claims, underlies the emphasis on a rights-based legal discourse, and helps explain high rates of litigation compared to other industrialized nations.[30] "In America . . . 'egalitarianism is based on the notion of

26. Id. at 23, quoting Glendon, "Rights in Twentieth Century Constitutions," in Geoffrey R. Stone, Richard A. Epstein & Cass R. Sunstein (eds.), *The Bill of Rights in Modern States* (1992) at 521.

27. *Justice Without Law?*, at 138.

28. *Faces of Justice*, at 11. Damaška does not claim that political organizations and goals are the only determinant of legal processes. Significantly, he acknowledges the limits imposed by "existing inventories of moral and cultural experience, the fabric of inherited, beliefs, and similar considerations." Id. at 241.

29. Lipset, supra n. 13, at 43.

30. Id. at 49-50. The claim of American litigousness is supported by statistics showing that the United States leads five other industrialized European nations, by far, in number of lawyers per population and tort costs as a percentage of GNP. See Table 1-1 at 50. See also id. at 227, showing similar disparities between the U.S. and Japan. The connection between American individualism and high court use is also asserted by Auerbach, see supra n. 15, at 10-11, 138-40.

Marc Galanter has elsewhere challenged the claim that Americans are more litigious than other peoples, see "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," 31 *UCLA L. Rev.* 4 (1971).

equal rights of free-standing, rights-*asserting* individuals.'"[31] The American attachment to courts suggests, perhaps, a weakness in the claim of anti-statism. Courts are governmental institutions and a resort to courts to resolve disputes is unavoidably to invoke governmental authority. While there is a point here, I think that the difference between courts and other governmental institutions is such that the inclination to sue in pursuit of private interest is better understood as of a piece with individualism and laissez-faire. Compared with most governmental institutions, courts are responsive to individualized pursuit of personal claims. Consider that private litigation is for the most part controlled by the litigants, who provide its impetus, its direction and often, its ultimate resolution. (The vast majority of American civil actions are settled before trial.) Courts neither meddle nor rescue unless called upon to do so, and then paradigmatically only for the litigants before them. And, as we shall see in more detail, the values of a distinctly American ideology underlie the forms and structures of disputing in America, and indeed have contributed to an American "exceptionalism" in disputing.

American Disputing In Comparative Context

"Adversarial" or "Inquisitorial"

The too-familiar division of the modern world's procedural systems into the adversarial (common law) camp versus the inquisitorial (civil law) camp turns on categories that are imperfect at best – differences between nations within a category can be considerable.[32] Moreover, the core terms are insulting as well as misleading – Continental lawyers vehemently deny that their system is "inquisitorial" in any pejorative sense.[33] Nonetheless, the labels can serve as a convenient shorthand, so long as we recall their limitations. Even Damaška, who criticizes too simplistic a reliance on this division, agrees that " . . . the core meaning of the opposition remains reasonably certain. The adversarial mode of proceeding takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The nonadversarial mode is structured as an official inquiry. Under the first system, the two adversaries take charge of

31. Lipset, supra n. 13, at 235, quoting Dore, "Elitism and Democracy," 14 *The Tocqueville Review* (1993) at 71 (emphasis in original).

32. See *Faces of Justice*, at 3-6.

33. See Damaška at 4. He notes that "To Anglo-Americans, on the other hand, the two concepts are suffused with value judgments: the adversary system provides tropes of rhetoric extolling the virtues of liberal administration of justice in contrast to an antipodal authoritarian process . . ." Another trenchant criticism of the terminology is found in Mauro Cappelletti & Bryant G. Garth, Chapter 1, "Civil Procedure," *XVI International Encyclopedia of Comparative Law* (1987) at 31-32. They recognize however, that many common law jurists continue to use the term. See also Taruffo, supra n. 1, at 28 (the distinction is "to a large extent unreliable or useless").

most of the procedural action; under the second, officials perform most of the activities."[34]

The inclusion of the United States in the adversarial group suggests the connection of its procedures to liberty, individualism, egalitarianism, populism, and anti-statism; in sum, to the "competitive individualism" so highly valued in America.[35] As I will take pains to show, the American dispute process – like its values – is exceptional even when measured against its siblings in the common law family. The same themes are also captured when we examine American disputing in the context of the more nuanced schema of the world's procedural systems developed by Mirjan Damaška.[36]

American Exceptionalism in Damaška's Construct

In *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* Damaška offers an alternative to the adversarial/inquisitorial categorization of procedural systems. He posits two dimensions along which the relevant types of government can be plotted. One concerns the "structure of government," i.e., its "character" of authority. The second "concerns the legitimate function of government — more specifically, views on the purpose to be served by the administration of justice."[37] He argues that a nation's procedures will reflect these fundamental attitudes about government and that this dynamic is observable, albeit imperfectly, in the real world.[38] Although he does not undertake a country-by-country comparison of procedures, he often distinguishes between Continental and Anglo-American systems (sometimes separating the "Anglo" from the "American") and does refer to particular nations as exemplars. He shows how particular processes flow from basic predilections about the form of governmental organizations, and that these vary with historical experiences of particular places. Damaška thus shares the view that the cultural grounding of modern disputing institutions is very deep. It is for this reason that, as he notes, what appears "normal" in one system can seem "grotesque" to another.[39]

34. *Faces of Justice*, at 3.

35. See Lipset, supra n. 13, at 108: "The American social structure and values foster the free market and competitive individualism . . ." See also Jacob in supra n. 18, at 29: "[T]he legal system in the United States reflects core values of the nation's political and legal tradition, particularly an emphasis on individual rights, a focus on constitutionalism of proposed actions, limited government, and aspirations of egalitarianism."

36. *Faces of Justice*. See discussion of his approach in the text at nn. 103-31, infra.

37. *Faces of Justice*, at 9.

38. *Faces of Justice*, at 8-14; 240-41.

39. *Faces of Justice*, at 66.

Damaška's "Character of Authority"

To describe the character of procedural authority, Damaška's distinguishes the hierarchical ideal from the coordinate ideal.[40] According to Damaška, the structure of the authority (hierarchical or coordinate) informs the process used by that authority.[41] The hierarchical ideal "essentially corresponds to conceptions of classical bureaucracy. It is characterized by a professional corps of officials, organized into a hierarchy which makes decisions according to technical standards."[42] This ideal embraces a "strong sense of order and a desire for uniformity,"[43] through the use of specialists or professionals motivated by an "ethic of cooperation" reinforced by supervision from above,[44] and by rule-bound decision making.[45] "Private procedural enterprise is thus almost an oxymoron in the lexicon of hierarchical authority."[46]

The coordinate ideal is "defined by a body of nonprofessional decision makers, organized into a single level of authority which makes decisions by applying undifferentiated standards."[47] The machinery of justice is "amorphous."[48] Authority is vested in amateurs, "roughly equal lay officials" who may be assisted by professionals, but whose decision making will suffer from a lack of consistency. "A cast of mind that aspires to the ideal of coordination must be prepared to tolerate inconsistencies – and a considerable degree of uncertainty – more readily than one attached to the hierarchical vision of authority."[49] Thus, responsibility for proof taking and other preparation is not vested in officials but in the parties and their representatives.[50]

Hierarchical authority and the process institutionally favored by such an authority – with its emphasis on "the authority of rules" – would be antithetical to American values, whereas the coordinate authority model would be commensurate with them. As I would predict given what we know about American culture, Damaška finds that "the American machinery of justice . . . continues to be more deeply permeated by features embodied in the coordinate ideal than are the judicial administrations of any other industrial state in the West."[51]

40. *Faces of Justice*, at 17.
41. *Faces of Justice*, at 47.
42. *Faces of Justice*, at 17.
43. *Faces of Justice*, at 19-20.
44. *Faces of Justice*, at 20-21.
45. *Faces of Justice*, at 22-23.
46. *Faces of Justice*, at 56.
47. *Faces of Justice*, at 17.
48. *Faces of Justice*, at 23.
49. *Faces of Justice*, at 26.
50. *Faces of Justice*, at 57-65.
51. *Faces of Justice*, at 18.

The Continental model, contrariwise, has long had[52] and still retains "a very pronounced bureaucratic hierarchical flavor, especially when observed from the common-law perspective."[53]

Damaška's "dispositions of government"

The second determinant of process is the "disposition" of the government to be either a "reactive" or "activist" state.[54] The former simply provides a framework within which citizens pursue their own goals. The administration of justice is typically engaged in conflict-solving. Not so the activist state. It embraces a particular model of the good life and strives to achieve it. Justice can be characterized as engaged in implementing policy. "The legal process of a truly activist state is a process organized around the central idea of an official inquiry and is devoted to the implementation of state policy."[55] Real world examples include the former Soviet Union and Mao's China.[56]

Damaška argues that the different dispositions of states and justice roles have necessary impacts on the way procedural authority is organized and implemented. He notes three ways in which "[p]rocedural arrangements follow ideas about the purpose of government: One, they express "fundamental tenets of a political doctrine, as where the "ideal of personal autonomy" is transferred to the administration of justice in the reactive state. Second procedural form follows purpose if it is "conceptually implied" in it. Third, the form may advance the objectives of the judicial apparatus better than available alternatives.[57]

Since the conflict-solving mode of procedure fits best with a laissez-faire state, it is hardly surprising that "[t]he American legal process allocates an unusually wide range of procedural action to the adverse parties, especially in trial preparation, creating opportunities for free procedural enterprise unparalleled in other countries."[58]

The Damaškan Synthesis

After exploring the separate procedural consequences of his two different sets of antipodes (hierarchical versus coordinate authority and the reactive state versus the activist state) Damaška offers some thoughts on how they combine, for, he argues, there is no necessity that an activist state embrace only hierarchical arrangements of government or that the reactive state be comfortable only with coordi-

52. Damaška traces it to the eleventh century organization of the Catholic Church, see *Faces of Justice*, at 29-38.
53. *Faces of Justice*, at 38.
54. *Faces of Justice*, at 71-88.
55. *Faces of Justice*, at 147.
56. *Faces of Justice*, at 194-204.
57. *Faces of Justice*, at 94-96.
58. *Faces of Justice*, at 108.

nate arrangements. Time and space prevent consideration here of the subtleties of these interactions. What is interesting for my purposes is the degree to which American processes most comfortably replicate features expected when the reactive state embraces the coordinate model.[59] Even when American government adopts some "activist" purposes (as in the aftermath of the New Deal or in the embrace of "public interest" litigation), "it is one of the most striking facets of the American brand of state activism that the state apparatus continues to be permeated by features attributable to coordinate authority. These surviving features – especially in the machinery of justice – are more pronounced than in any other modern industrial state."[60]

Damaška's great achievement was to create "a framework . . . within which to examine the legal process as it is rooted in attitudes toward state authority and influenced by the changing role of government."[61] While insisting that political factors "play a central role in accounting for the grand contours of procedural systems,"[62] he adds that a government's choice of procedural arrangements is limited by "existing inventories of moral and cultural experience, the fabric of inherited beliefs and similar considerations." We thus share an appreciation for the cultural connection of even modern state disputing institutions. What I attempt to add to the Damaškan analysis of procedural forms is, first, a more detailed analysis of the American "case" in cultural context and, second, a more direct reliance on culture (i.e., deeply held values and beliefs) as the primary determining variable. Social preferences for coordinate arrangements and for a reactive state are not separate from the more general values of a society, they are in no small part its product: The place of American disputing in Damaška's matrices flows from the egalitarianism, individualism, laissez-faire, liberty, and populism identified in so many areas of its social life.

Let us turn to specific procedural rules that reflect these values.

Some Features of American Procedural Exceptionalism

My claim that there is a culturally constituted American "procedural exceptionalism" turns primarily on four of its features. They are (i) the civil jury; (ii) the use of party-controlled pre-trial investigation; (iii) the relatively passive role of the judge at the trial or hearing; and (iv) the method of obtaining and using expert opinions on technical matters.

59. *Faces of Justice*, at 231-39.
60. *Faces of Justice*, at 232.
61. *Faces of Justice*, at 240.
62. *Faces of Justice*, at 241.

(i) *The civil jury.* "The jury is one of America's venerated institutions."[63] It has achieved and maintained an importance in American trials that is unparalleled elsewhere in the world. While the jury retains a lively role in criminal cases in most English-speaking nations (but not in the rest of the world),[64] it is striking that in no other nation has the jury been retained in civil litigation to the degree it has in the United States. The right to a jury trial in civil cases is historic and iconic: it was added to the Federal Constitution by the Seventh Amendment as one of the Bill of Rights ratified in 1791.[65] In 1938, when the Federal Rules of Civil Procedure were promulgated, its drafters thought it desirable to include a provision reminding readers that "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."[66] The Seventh Amendment and the Federal Rules apply only in federal litigation, but the right to a jury in civil cases has been constitutionalized by the states as well. Typical is the provision of the New York Constitution: As adopted in 1777, it provides that the right "shall remain inviolate forever."[67]

Contrariwise, civil juries have never been found in any of the countries that follow Continental procedure.[68] "Truly astonishing in the Continental view was the degree to which decisions of the lay jury – the paradigmatic adjudicator – escaped supervision through regular appellate mechanisms."[69] The United Kingdom, where it originated, has abandoned the civil jury in all but a very few kinds of

63. Schwarzer & Hirsch, "The Modern American Jury: Reflections on Veneration and Distrust," in *Verdict*, (Robert E. Litan ed., 1993) at 399. See also George L. Priest, *Justifying the Civil Jury*, id., at 103 ("Among the various mechanisms and institutions of American democracy, there are two it seems unthinkable to criticize: the right to vote and the system of trial by jury, both civil and criminal.") Judith Resnik, however, argues that the American legal system is in the process of devaluing fact-finding, whether by jury or judge, see "Finding the Factfinders," in *Verdict*, supra at 500.

64. Mirjan R. Damaška, *Evidence Law Adrift* (1997) at 28 (notes that while juries were established in France and elsewhere following the French Revolution, "the Continental love affair with the jury was one of short duration." Juries are used in criminal cases only in Belgium, Switzerland and Denmark id. note 5.

65. The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

In criminal cases, the right to a trial by an "impartial jury" is guaranteed by the Sixth Amendment to the Constitution.

66. Federal Rule Civ. Proc. 38(a).

67. The Constitution of the State of New York, Art. I, Sec. 2.

68. *Faces of Justice*, at 36, noting that lay participation in decision making was introduced into the criminal process. See also id. at 208, noting the use of lay jurors in French criminal trials after the revolution.

69. *Faces of Justice*, at 219-20. The passage refers to the pre-twentieth century period when "classic civil procedure" was still used in England, including the civil jury.

cases,[70] and most of the countries with legal roots in England world have followed suit.[71]

It is not hard to see how the historic American attachment to the jury is bottomed on core American values. It is quintessentially an egalitarian, populist, anti-statist institution. It is "strongly egalitarian"[72] because it gives lay people with no special expertise a fact-finding power superior to that of the judge, despite all of his or her training and experience. Although it is true that the judge presiding at the trial may overrule a jury verdict and grant judgment "as a matter of law" against the party favored by the jury, this power is circumscribed. It can be exercised only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party . . ."[73] The jury is also egalitarian in that it is a duty of citizenship imposed on all and that every juror has an equal vote regardless of education or social status. Indeed it is strikingly an institution which plunges people, willy-nilly, into a situation in which communication and cooperation across distinctions of racial, ethnic and wealth are mandatory.

The civil jury is populist, "an avatar of democratic participation in government,"[74] because it allows the people to rule directly.[75] A jury can determine, for example that a particular product was designed or manufactured in an unreasonably unsafe manner, thus setting safety standards that might otherwise be governed by statute or regulation. Jurors are well aware of their power to act as a "mini-legislature" in such cases. According to a recent article in the journal of the American Bar Association, "Like no time before, the 12 people seated in the jury box regularly demonstrate an increasing willingness—even a clamoring—to force basic American institutions, such as government, business and even private social organizations, to

70. On the decline of the civil jury in the U.K., see Mary Ann Glendon, Michael Wallace Gordon & Christopher Osakwe, *Comparative Legal Traditions* (2nd ed. 1994) at 613-27. The materials there collected indicate that the atrophy of the civil jury in the U.K. began during the First World War and culminated in 1965 when the Court of Appeal decided that there was no right to a jury trial except where specifically authorized by statute.

71. Kaplan & Clermont, "England and the United States," in Chapter 6, Ordinary Proceedings in First Instance, Civil Procedure, XVI *International Encyclopedia of Comparative Law* (1984) at 3, 29 n. 265 (reports that there is some variation among the provinces of Canada and Australia but that in general the jury is seldom used in civil cases in those countries).

72. *Evidence Adrift*, at 39.

73. Federal Rule Civil Proc. 50(a). The judge can also set the verdict aside if it is "against the weight of the evidence', but in such case there is a new trial before a new jury.

74. *Evidence Adrift*, at 42.

75. See Taruffo, supra n. 2, at 28 (use of jury trials reflects a cultural preference for direct rule of "the people" as opposed to the values of "professional training and efficiency").

change the way they operate."[76] The article lists a number of cases in which juries awarded large verdicts in order to "send a message" to the defendant and its industry that certain behavior was not acceptable.

Although the civil jury is of course an organ of government, it nonetheless has an anti-statist quality because it allows the people to decide matters differently than the other institutions of government might wish. Both in the civil and criminal spheres, this is no mere theoretical matter, as demonstrated by the debate over jury nullification, the sometimes-claimed power of the jury to ignore the law as a way of "doing justice" that continues to the present.[77]

The jury's connection to American individualism is not as obvious as its egalitarian and populist qualities. In some sense it is anti-individualist because the jury operates as a collectivity. Moreover, people do not volunteer to serve as jurors but are compelled by force of law to do so. On the other hand, the role of the individual is apparent because the number of persons on each jury is small, twelve or less, and as few as six in some jurisdictions. Where, as is traditional, a verdict depends on unanimity, a single hold-out can abort the trial and effectively command a new one.[78] But the American individualism as a value that underlies the civil jury is better appreciated when we introduce the point of view of the litigants. For the individual citizen whose liberty or property is in its hands, the jury is seen as a protector of the rights in a way that the judge, an official of the state, is not.

The synchronic development of an egalitarian American ethos and the jury as a device for protecting individual rights exemplifies the reciprocally constitutive role of cultural values and dispute institutions. The iconic status of the jury in American life emerged at the same time as the American people took on their "exceptionalist" values. It was in the period around the time of the American revolution that the jury became "so deeply embedded in American democratic ethos."[79] By the mid-eighteenth century, as Americans increasingly distinguished themselves as a separate people, juries had become a means of resisting the Crown's control over colonial affairs and British attempts to circumscribe jury powers were seen as a further cause of grievance.[80] Tales of courageous jurors who stood up to tyrannical English government have ever since been an important part of the

76. Curriden, "Power of 12," *ABA Journal* 36 (August 2000).

77. Jeffrey Abramson, *We, the Jury* (1994) at 57-95. Several examples of juries' refusal to convict despite overwhelming evidence of guilt are presented.

78. Unanimity is not required in all jurisdictions. In New York, for example, a verdict of five-sixths is sufficient in civil cases, see N.Y. Civil Practice Law and Rules 4113(a).

79. Valerie P. Hans & Neil Vidmar, *Judging the Jury* (1986) at 32.

80. Supra n. 77, at 23-33 and authorities cited. See also id. at 31-38.

American self-image: "Most American history books hail the trial of [John Peter] Zenger for seditious libel in 1735 as the leading case for freedom of the press and as an example of a victory of the people over an aristocracy."[81] Zenger, the publisher of a New York newspaper, was prosecuted because of the journal's sharp criticism of the appointed English governor of the colony. Andrew Hamilton, who defended Zenger, wove together a substantive claim – the right of the people to criticize their government – and the procedural point that the jurors had the power to protect that right.

> Jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings in judging of the lives, liberties or estates of their fellow subjects.[82]

Although the hagiography surrounding the Zenger case has arguably idealized the participants, the case "did help to establish unique American views on the jury and its place between law and those governed."[83] The jury's continuing role in the construction of the American ethos was observed by Jefferson, who called jury service the "school by which [the] people learn the exercise of civic duties as well as rights"[84] and by Tocqueville: "The jury, and more especially the civil jury, . . . is the soundest preparation for free institutions. . ."[85] Modern scholars contend that the jury continues to serve as an influence on the moral reasoning of participants.[86] A recent example of the jury/values connection is provided by the acquittal of John DeLorean, the entrepreneur who claimed that police entrapment had led to the charge of drug-dealing. One juror explained the verdict: ". . . there is a message here . . . It's that our citizens will not let our government go too far . . . It was like the book *Nineteen Eighty-Four*. They set one trap after another for DeLorean. . ."[87]

It is telling that George Priest links the right to vote and the jury trial as the two institutions of American democracy that it "seems simply unthinkable to criticize."[88] Both are icons of American values. The attachment to the jury is not, *pace* Professor Priest, shared by all Americans, and its place in the legal system is not static.[89] Like the

81. Id. at 32.
82. Id. at 34.
83. Id., note 3 at 255.
84. As quoted by Abramson, supra n. 77, at 31.
85. As quoted by Hans & Vidmar, supra n. 79, at 249.
86. Id. at 248-49.
87. Id. at 18. On the role of the jury in softening the harsh application of the contributory negligence rule in America, see Landman, "The History and Objectives of the Civil Jury System," in *Verdict*, supra n. 63, at 22, 46-47.
88. See supra n. 44.
89. A thoughtful critical assessment of the civil jury was made by Jerome Frank in *Courts on Trial* 110-25 (1949). For an argument that the popular conception of the jury in America has undergone changes over the life of the country, see Abramson, "The Jury and Popular Culture," 50 *DePaul L. Rev.* 497 (2000).

culture in which it is found, it is contested and dynamic; its powers have ebbed and flowed in response to changes in social life. In one sense the story has been one of diminution, both in the frequency in which civil cases are tried to a jury and in its power in respect to the judge.[90] In another, as we have seen, jurors are currently willing and eager to exercise their broad powers when they have a chance.[91] Whether the American civil jury will, like its British ancestor, atrophy to irrelevance depends in large part on the continued viability of those ingredients of the collective American psyche that have sustained it so far.[92] Surveys of attorneys, judges, and the general public show that the civil jury continues to enjoy very wide support in the United States.[93]

(ii) *Party control of evidence-gathering; pretrial discovery.* Individualism, egalitarianism, laissez-faire, and anti-statism are also evident in the another disputing practice that, at least in degree if not in kind, is uniquely American – pre-trial party-conducted discovery. Again, the contrast is most stark when the U.S. is compared with Continental systems.

American rules of procedure allow the attorneys to pursue the discovery of evidence outside the courtroom and yet be backed by the authority of the court in demanding the cooperation of opponents and witnesses. Under the typical American rules each party has the power to require an opponent (or other potential witnesses) to submit to oral questions under oath outside the presence of the judge (a deposition), to answer written questions under oath (interrogatories); to open its files to inspection, or, where physical or mental condition is in issue, to submit to a medical examination by a physician of the opponent's choosing.[94] As one British practitioner put it, "An American is incapable of handling a case without discovery and deposition. Discovery is his shower and deposition is his breakfast."[95] Other than

90. Supra n. 79, at 31-46; In 1999, less than two percent of all civil actions brought in federal courts were resolved by a jury trial, see *New York Times*, March 2, 2001, p. 1.

91. See text at supra n. 76.

92. Stephen Yeazell argues that the different fates of the British and American juries reflect more pervasive differences between the two cultures, most notably different attitudes about the concentration of governmental power: "The persistence of the civil jury in the United States reflects a distrust of concentrated governmental power." Yeazell, "The New Jury and the Ancient Jury Conflict," 1990 *U. Chi. Law Forum* 87, 106 (1990).

93. See the surveys collected in Hans, "Attitudes Toward the Civil Jury: A Crisis of Confidence?," in *Verdict*, supra n. 63, at 248. An "ambitious national survey" conducted in 1978 found that eighty per cent of the respondents rated the right of trial by jury as "extremely important" and most of the others rated it as "important." Id. at 255.

94. Under an amendment to the Federal Rules of Civil Procedure that became effective in 2000, each party must also make available to their adversary a list of documents and witnesses relevant to their case. See Fed. R. Civ. Proc. 26(a)(1).

95. John Lew, as quoted in *The Daily Deal*, May 15, 2001, at 5.

setting a time limit for the completion of the process, the judge will ordinarily get involved in it only if one of the parties requests a judicial ruling on the propriety of a particular request or response. Nothing approaching this out-of-court fact discovery is permitted by civil law courts: "The weakness of Continental 'discovery' is proverbial. . ."[96]

It may be argued that the difference in discovery rules is best explained not by underlying cultural differences but by the absence of a concentrated trial in the civil law system. The difference in the organization of proof-taking may be traceable to the historic role of the jury under common law. A concentrated trial is virtually mandatory when a group of lay people are required to take time out of their own work lives to hear and help decide a dispute, but is hardly necessary when the facts will be heard by a professional judge who will be at the court daily. As a practical matter there is thus less need for "pretrial" preparation in the Continental scheme because of the episodic approach to proof-taking. The readiness by which hearings may be scheduled for future occasions obviates the concern that surprise evidence will "ambush" a party to the detriment of the truth-finding process: the surprised party will have an opportunity to present rebuttal evidence at a subsequent session. Pre-trial discovery is, contrariwise, important to American litigation because a substantial delay in the trial to gather new evidence is inconvenient or, in a jury case, virtually impossible.[97]

But there is more to the issue than scheduling differences: The civilians view discovery with repugnance, not only because they find it unnecessary but also because they think it inappropriately intrusive for one private party to be able to rummage through the files of an adversary simply because they are involved in litigation.[98] In civil law countries compulsory production of evidence is viewed as more properly a governmental function and discovery is objectionable because it allows the litigants to exercise powers and functions that should be reserved for the court. In the Continental view the formal questioning of witnesses, for example, should be done in court – not

96. *Evidence Law Adrift*, at 115, n. 80. See also id. at 132-33; *Civil Procedure*, supra n. 33, at 1-5 (noting that a "characteristic" of contemporary procedure in the civil law countries "is that the investigative power of the parties and their lawyers is either extremely limited, as in Spain and Italy, or at least not as great as in common law countries." See *Faces of Justice*, at 132-33. The new Japanese Code of Civil Procedure (promulgated June 26, 1996), however, includes Article 163 which allows litigants to serve written requests for information on other parties. This rule, modeled on American interrogatories, is a "landmark in the history of Japanese civil procedure," Omura, "A Comparative Analysis of Trial Preparation: Some Aspects of the New Japanese Code of Civil Procedure," in *Toward Comparative Law in the 21st Century* (1998) at 723, 731. *Faces of Justice*, at 131.

97. *Faces of Justice*, at 131.

98. See discussion and authorities cited in Rudolf B. Schlesinger, Hans W. Baade, Peter E. Herzog, and Edward M. Wise, *Comparative Law* 69-75 (6th ed. 1998).

at a deposition in some lawyer's office. "Quite predictably, attempts by American attorneys to conduct depositions on the Continent are treated there as offensive to the prerogative of the state to administer justice and are now outlawed in several European countries."[99]

Moreover, the purely instrumental explanation is undercut because American discovery practice differs from those of other common-law countries in which concentrated trials are still the norm. Like the jury, the American approach to pretrial party-dominated discovery has roots in English practice.[100] The power to compel discovery was first developed by the English Court of Chancery.[101] But here again, it was in America that it was transformed into an "exceptional" practice – a set of mandatory investigation tools available to private litigants not found in the United Kingdom or elsewhere. As a result, "American discovery practice sometimes appears 'exorbitant' – 'fishing expeditions' – even to lawyers in other common law countries."[102] The key difference between American and British practice is thus in the breadth of the demands that can be made on the adversary party. In England pre-trial requests for documents have been limited to those concerning facts alleged by the pleadings more strictly than in the U.S. According to Jack Jacob, "if there are in truth other facts which would show or prove he has a well founded claim or defense, he is not entitled to discover them or to frame or reframe his case on their basis."[103] The recent reforms of English procedure have limited document discovery still further.[104] Moreover, the American style discovery deposition is not available in Britain, where the out-of-court taking of oral testimony is available only by court order and is largely limited to situations in which a witness will be unable to attend the trial.[105]

Party controlled pre-trial fact gathering, American style, promotes the values I have identified as central to its culture. It is egali-

99. *Faces of Justice*, at 67.

100. See discussion of the "Anglo-American" model, as distinguished from the Continental, in *Faces of Justice*, at 221.

101. See Jack I.H. Jacob, *The Fabric of English Civil Justice* 93-94 (1987); Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952) at 201-28; Subrin, "Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules," 39 *B.C.L. Rev.* 691 (1998).

102. *Faces of Justice*, at 133, n. 67.

103. *Fabric of English Civil Justice*, supra 99. Compare Ian Grainger and Michael Fealy, *The Civil Procedure Rules in Action* 87 (2d ed. 2000) (describes a broader availability of document discovery prior to the adoption of the new Civil Procedure Rules in 1999 than that implied by Jacob).

104. Rule 31.5 and 31.6, The Civil Procedure Rules (2d ed. 1999). See also Grainger & Fealy, supra n. 103, at 87-94.

105. Rule 34.8 and Comment 34.81, id. at 460. See also David Greene, *The New Civil Procedure Rules* 316-17 (1999) ("[I]t is unlikely that the Court will go marching down the road of full deposition hearings as in the American model. In any event in the USA the taking of depositions and the deposition hearing are part of the discovery process. Rule 34.8 is not part of the discovery process within this jurisdiction.").

tarian because it "levels the playing field" in that discovery gives an economically weaker party the means to make a deserving case that would otherwise be hidden in the files of a wrong-doer. A common example is a products liability action by an injured user who is able to find proof of improper cost-cutting in the manufacturer's own files. The egalitarianism expressed by discovery is of the American kind in that it offers equality of opportunity, not of result: Party-driven discovery also means "party-paid" fact gathering. The process can be very expensive, because it is labor intensive, and much of the labor is performed by attorneys. Although the American contingent fee rules which allow lawyers to advance the expenses of litigation moderate this effect somewhat, there are still litigants of limited means who will be subjected to oppressive discovery demands by the opposition. This is less likely to be encountered in countries where the judge takes on much of the investigative labor. The rules of extra-judicial discovery are thus egalitarian in the sense identified by Lipset; they are not dependent on a government agency to pick up the cost and thus even out the disparity of resources. As in other areas of life, American egalitarianism blinks at disparity of resources and focuses on formal equality of opportunity.

Party-controlled discovery also expresses the populism, laissez-faire, and anti-statism so pronounced in American culture. For Americans there is nothing wrong with a procedural device that allows citizens and their attorneys to exercise substantial litigation powers outside of the court and without obtaining judicial permission; quite the contrary.

The relationship between discovery and individualism is arguably more complex. On the one hand, discovery reflects "competitive individualism" in that it allows each attorney to create and pursue a discovery program tailored by their own assessment of the best way to proceed in the particular case, without much judicial supervision and only loosely cabined by the rules of procedure. From the point of view of the party (or witness) from whom discovery is sought, however, the intrusions of the prying opponent can feel like a violation of self. Consider on this score that a plaintiff claiming damages for physical injury may be subjected to a medical examination conducted by a physician chosen by the defendant.[106] The plaintiff must accede, or suffer a dismissal of the case. Moreover, the very idea that one must assist an adversary prepare a case against you rests uneasily in an adversary system that otherwise exemplifies "the 'each person for himself' mentality."[107]

106. In the federal courts this may be done only if the court so orders, Rule 35, Fed. R. Civ Proc., but such orders are routinely granted. In many state courts judicial permission need not be obtained. See, e.g., N.Y. CPLR 3121.

107. Subrin, supra n.101, at 691, 695 (argues that individualist attitudes were a source of resistance to the expansion of pre-trial discovery).

It seems that the discovery system accords more weight to the individualism encapsulated in a party's power to obtain discovery than to that of the resisting party. Of course, in most cases the parties will at various times be in both of these positions, so the system both advances and restricts their personal freedom of action. One explanation of the outcome lies in the recognition that in an economic system built on competitive individualism there are powerful if lamentable incentives to cut corners and shade the truth to advance one's cause in litigation as elsewhere. The rules of the game must be designed to reveal such chicanery and party-directed discovery is an important part of that design. Interestingly, this device assumes that the self-interest of the parties will promote the truth finding process if they are given the tools with which to do so. In this deep sense, the rules of discovery are consistent with American individualism.

(iii) *The Role of the Judge*

A significant difference between American litigation and that used in the civil law countries concerns the role of the judge: the American remaining largely passive during the trial except when called upon by the parties to make a ruling (a stance shared with their cousins on the English bench, at least until the reforms of the Rules of Civil Procedure in 1999[108]) whereas the Continental judge plays a much more active role at the hearing. At the American trial it is the attorneys, not the judge who decides what evidence is needed, and it is the attorneys who present the evidence through the examination of witnesses and presentation of documents. A fictional American lawyer once caught the predominant view admirably when he offered the opinion that an American judge "is sworn to sit down, shut up, and listen."[109]

John Langbein claims that the "'grand discriminant'" between the American and continental legal cultures is "adversarial versus judicial responsibility for gathering and presenting the facts."[110] Ger-

108. The passivity of the English judge is discussed in Zweigert and Kotz, *An Introduction to Comparative Law* 281-83 (1987). The new Civil Procedure Rules, which came into force in April, 1999, grant the trial judge considerably more discretion and responsibility. According to the 1999 "White Book," a "radical" feature of the Rules is "that the reactive judge (for centuries past the heart of the English Common Law concept of the independent judiciary) has gone. Instead, we have a proactive judge, whose task is to take charge of the action at an early stage and mange its conduct in a way we have never seen before in this jurisdiction." *Civil Procedure Rules* at ix. See also id, Rule 32.1; Andrews, "A New Civil Procedural Code for England: Party-Control 'Going, Going, Gone,'" 19 *Civil Justice Quarterly* 19, 28 (2000).

109. Otto G. Obermaier, quoting from Defending Billy Ryan by George V. Higgins (1992), in "The Lawyer's Bookshelf," *New York Law Journal*, December 1, 1992, at 2.

110. Langbein, "The German Advantage in Civil Procedure," 52 *U. Chi. L. Rev.* 823, 863 (1985). On the power of the judge in civil law countries following the Romanist system such as France, see Alphonse Kohl, Romanist Legal Systems, in Chapter 6, Ordinary Proceedings in First Instance, Civil Procedure, XVI *International Encyclopedia of Comparative Law* (1984) at 57, 63, 79, 99. In Germanic countries, see Hans Schima and Hans Hoyer, Central European Countries, id., 101,122, 127.

many, which is in this regard typical of many civil law countries, can accordingly serve as a basis for examining the point in more detail.[111] The German judge has a statutory "duty" to clarify issues,[112] which involves the court deeply in the development of the case. "Always examining the case as it progresses with understanding of the probably applicable norms, the court puts questions intended to mark out areas of agreement and disagreement, to elucidate allegations and proof offers and the meaning of matters elicited in proof-taking. . .The court leads the parties by suggestion to strengthen their respective positions, to improve upon, change, and amplify their allegations and proof offers and to take other steps. It may recommend that the parties take specific measures in the litigation."[113] The court, acting on recommendations from the parties, decides whether to hear a particular witness[114] and the order in which the witnesses will be heard and documents presented.[115]

"One of the most notable differences" between the process at the common law trial and the oral hearing in the civil law process "is the method of interrogating witnesses."[116] In the civil law countries it is the judge who alone or predominantly questions the witnesses. Even if the attorneys are allowed to put some questions, and even if, as in Italy, the questions are actually drafted by the attorneys and submitted to the judge for use, vigorous cross-examination by counsel is a rarity. Moreover, in some of the civil law countries, "Witnesses may be summoned and testimony ordered by the judge without a prior request from the parties."[117]

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111. I have previously discussed the role of the German judge vis-à-vis the American in Chase, "Legal Processes and National Culture," 5 *Cardozo J. of Int'l & Comp. L.* 1 (1997).

112. Kaplan, supra n. 86, at 1224.

113. Kaplan, supra at 1225. See also id. at 1472: "In Germany and the neighbouring countries in Continental Europe procedural law is rather based on the idea that it will be easier to get at the truth if the judge is given a stronger role: he should be entitled, indeed bound, to question, inform, encourage, and advise the parties, lawyers and witnesses so as to get a true and complete picture from them. . ." Compare the discussion in Allen, Kock, Reichenberg & Rosen, "The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship," 82 *NW. U. L. Rev.* 705 (1988) at 723-24, emphasizing rules which bind the judge to the parties' definition of the issues.

114. Kaplan, supra at 1233, n.161. See also Bernstein, supra n. 2 at 593, stressing the rule that the German judge can call only those witnesses who have been nominated by the parties. But see id. at 592 referring to exceptions "in certain cases, such as family matters." See also Kaplan, supra at 1224, 1228, noting that the judge may draw adverse inferences if the party refuses to follow the court's lead and nominate a particular witness.

115. Kaplan, supra at 1232-33. This is consistent with the previously mentioned power the court exercises over the development of the case in general.

116. *Civil Procedure*, at 1-24. The actual control over the substance of the questions varies by country. In Italy, for example, the judge is restricted to asking questions drafted by the parties, id. at 28.

117. *Civil Procedure*, supra n. 33, at 28. The authors list France, Germany, Austria, and Switzerland as examples. C.f., *Faces of Justice* at 221, suggesting that if a

Like other Continentals the German judge has the power to conduct the actual interrogation of the witnesses that is particularly telling:

> In the ordinary case there is relatively little questioning by the lawyers or parties. What there is of it is generally conducted direct rather than through the court. For the lawyer to examine at length after the court seemingly has exhausted the witness is to imply that the court has not done a satisfactory job – a risky stratagem.[118]

Thus, what is arguably the most important role of American trial lawyer – the examination and cross-examination of witnesses – is almost entirely ceded to the Continental judge.[119]

To be sure, recent changes in American litigation rules have tended to enhance the role of the court in relation to the parties: the whole concept of "managerial judging" centers on the power and responsibility of the judge to move the case along, to promote settlement if possible, and at the very least to get to the trial promptly.[120] One could argue that in this respect there has been a convergence between the systems, a point made forcefully by Adrian Zuckerman.[121] But the critical difference, "the grand discriminant" remains constant. It is still the American lawyer – not the court – that is responsible for gathering and presenting the proof. It is still the American lawyer – not the court – who is responsible for choosing the witnesses and for questioning and cross-examining them.[122] Notwithstanding the ritualized elevation of the American judge – the object of honors of place, dress and forms of address, it is the parties, through their lawyers, who dominate the trial itself. Note, too, how the differential in the American and Continental judicial powers par-

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Continental civil judge called a witness on his own, "such behavior would immediately provoke sharp reaction and rebuke from higher courts."

118. Kaplan, supra at 1234-35.

119. An interesting example is provided by Allen, supra at 728-29, where is reproduced portions of a German trial transcript. The judge's examination of the witness sounds much like an American lawyer conducting a skillful cross-examination. Allen and his co-authors contend that the judge has thus "created the testimony that he wanted. . .", id. at 729. Compare the discussion of this trial at Langbein, supra at 771. He argues that Allen et al have mischaracterized the judge's questions and that in fact the transcript reveals "an innocuous exchange in which a judge encourages a witness to be more precise by probing the circumstances that the witness volunteers."

Regardless of which view of the questioning one takes, it is clearly quite different from the approach one expects from an American judge.

120. See, e.g., Resnik, "Managerial Judges," 96 *Harv. L. Rev.* 374, 376-85 (discusses and criticizes this trend).

121. Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure Reform," in *Civil Justice in Crisis* 3, 47 (Adrian A.S. Zuckerman ed., 1999)(notes a trend toward greater control in common law countries). See also Taruffo, supra n. 1, at 29.

122. In her leading article on the topic, Judith Resnik focussed on the pre-trial and post-trial role of the judges – there is no claim that they have taken over the interrogation of witnesses at trial, see "Managerial Judges," 96 *Harv. L. Rev.* 376 (1982).

allels the differential in their powers to find the facts – the weaker American must often cede power to the lay jury.

The case for common law/civil law convergence is much stronger when we use Britain as the exemplar of the common law and look at the new English Civil Procedure Rules. Neil Andrews, describing "extensive" "modification of the adversarial principle,"[123] notes that the new rules include not only greater pre-trial managerial powers but also grant the British judge more power to control the trial, to prescribe the evidence required and the means of its presentation. Judicial questioning of witnesses will apparently become much more frequent.[124]

Is the greater role of the Continental judge at trial trivialized when we note that when it comes to finding and deciding what the law is, the American judge is the more powerful? The common law tradition allows the judge to help shape the law through legal decisions that become part of the corpus of *stare decisis*, whereas the civil law counterpart, considered to be merely *"la bouche de la loi,"* is theoretically limited to applying the law as set forth by the legislator. Even if true, this difference does not contradict my central point that in the courtroom, as between the judge and the litigants, the former is more powerful on the Continent. The American judges' common law powers come at the expense of the legislature, and are best seen as an example of that fragmentation of political power that is wholly consistent with the anti-statist, anti-hierarchical ideal.

Once again, the procedural practice (here, the role of the judge at trial) rather obviously accords with deep cultural proclivities. Michele Taruffo argues that the allocation of authority between the parties on one hand, or the court, on the other, reflects such cultural factors as "the trust in individual self help rather than in the State as a provider of legal protection; the trust in lawyers rather than judges, or vice-versa; different conceptions of the relationships among private individuals and between individuals and the public authority; different conceptions of whether and how rights should be protected and enforced and so forth."[125] The American case provides ample support for the rightness of this view: The individualist, egalitarian, laissez-faire American would not abide the degree of judicial domination of its trial that is perfectly acceptable in parts of the world where those values are less important.

123. Andrews, "A New Civil Procedural Code for England: Party-Control 'Going, Going, Gone'," 19 *Civil Justice Quarterly* 19, 28 (2000).

124. Andrews, supra at 33. See also authorities cited at n. 102, supra.

125. Taruffo, supra n. 1, at 30.

(iv) *The role of experts*

As compared to most of the rest of the world, the American use of expert testimony in the judicial process is also exceptional. As John Langbein has put it:

> The European jurist who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. In the Continental tradition experts are selected and commissioned by the court, although with great attention to safeguarding party interests."[126]

In American courts an expert normally appears as a witness "for" one of the parties. The expert, who has been chosen by, prepared by, and paid by the party, will be offered as a witness only if that party thinks the testimony will help him. Dueling experts thus offer conflicting opinions and it is the job of the jury to decide which version of reality is more persuasive. To be sure, the neutral expert approach is available: Rule 706 of the Federal Rules of Evidence allows the court to appoint a neutral expert beholden to the court alone. But this power is seldom invoked, and party selected experts dominate the American courtroom when technical issues are in dispute.[127]

This approach has been compared unfavorably to that prevailing in many civil law countries in which a neutral expert is selected and relied upon by the judge.[128] A major concern is the incentive for party experts to tailor testimony to please the hand that feeds them. But for the moment let us avoid an instrumental view of the matter and note the cultural aspects. I think that poor reception of the neutral expert in the United States is in large part due to the deep-seated values already identified. The public display of dueling experts in opposition to the annointment of a single authority signifies both discomfort with political hierarchy and – even more important – a cultural preference for a pluralism that extends even to views about how to determine reality. A society that requires court experts to submit their divergent opinions to the ultimate judgment of a lay person (whether judge or jury) is endorsing the idea that truth is elusive. Reality is understood to be uncertain. It is contingent; the subject of debate. The public spectacle of experts who disagree is not, in this sense, an embarrassing weakness, but an expression, here in a meta-

126. Langbein, supra at 835.

127. See Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence* 706 (1993) at 7-11 (reports on a survey of all federal district judge). See also Langbein, supra at 841; Reitz, "Why We Probably Cannot Adopt the German Civil Procedure," 75 *Iowa L. Rev.* 987, 992 n. 2 (1992)

128. Langbein, supra at 835-36.

phorical way, of the familiar American suspicion of authority and of orthodoxy. Given the multi-cultural heterogeneity of American society it is not surprising and may well be necessary. It is of a piece with the pluralism so evident in the American Constitution (and in the American law school classroom).

Much as the reliance in some societies on the verdict of an oracle in their trials reflects and reinforces reality dominated by magic, the dueling American experts reflect and reinforce an understanding of reality as democratic, that is to say, created and understood by each person according to their own lights, each suspended in a web of their own spinning. And, while a trial will be resolved by a judge or jury, the resolution will not be a determination of truth in an absolute sense, but only that one version is more probable than another. The rules and practices governing expert testimony reflect American cultural values as the jury, party conducted pre-trial discovery, and the party-dominated courtroom.

CONCLUSION

I leave this essay satisfied that the connection between American values and its formal dispute resolution system is clear. Still lacking is a fuller discussion of the direction of the influences. Is it all one way – from values to processes? Or, as I have observed elsewhere,[129] is there a reciprocal flow as well? Answering this question will take me to the broader topic of the means by which dispute ways are constitutive but is beyond the scope of the present essay.

129. See work cited in supra n. 7.