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Albert Alschuler

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Recommended Citation

Albert Alschuler, "Introduction: Adding a Comparative Perspective to American Criminal Procedure Classes," 100 West Virginia Law Review 765 (1998).

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INTRODUCTION: ADDING A COMPARATIVE PERSPECTIVE TO AMERICAN CRIMINAL PROCEDURE CLASSES

*Albert W. Alschuler**

Twenty-one years ago, John Langbein published a set of teaching materials titled *Comparative Criminal Procedure: Germany*.¹ This book was brief² and very readable. Much of it consisted of a popular writer's description of an intriguing German homicide trial.³

Langbein's book has been out of print for several years. Before it disappeared from the bookstores, its author volunteered to prepare an updated edition, but the West Publishing Company declined his offer. The company reported that it had not sold enough copies of the first edition to justify a second.

Although the publisher allows law teachers to duplicate Langbein's materials for their classes (and I still do), the unavailability of up-to-date materials offering an overview of Continental criminal procedure is sad. It is also a mark of American provincialism. A comparison of Continental legal systems with our own not only reveals different ways of resolving issues that all systems have in common; it also permits students to view their own system from the perspective of a different paradigm of procedural justice.⁴

Fortunately, the American Society of Comparative Law agreed in September 1997 to sponsor a series of pamphlets to better enable law school

* Wilson-Dickinson Professor, University of Chicago Law School.

¹ JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977).

² The book contained 151 pages of materials and 16 pages of appendices.

³ See LANGBEIN, *supra* note 1, at 13-37 (reproducing SYBILLE BEDFORD, *THE FACES OF JUSTICE: A TRAVELER'S REPORT* 103-51 (1961)). Langbein's materials include the official court documents for the case described by Bedford, and apart from the educational value of these documents, they make Bedford's astonishing accuracy apparent. Langbein relied on Bedford's journalistic account because German trials are not stenographically recorded.

⁴ A physicist who routinely uses Einstein's physics in her research while teaching Newton's physics in her classes can think in either paradigm, much as a bilingual person can shift from one language to another. See HOWARD MARGOLIS, *PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT* 126-27 (1987). Understanding a legal system other than one's own offers a somewhat comparable experience.

teachers to add comparative perspectives to their courses. Edward M. Wise, director of the Comparative Criminal Law Project at Wayne State, spurred this development, and the Society has authorized Wise to prepare a pamphlet on comparative criminal procedure as a pilot project. Richard Frase's contribution to this symposium describes other ways to add comparative perspective to criminal law and criminal procedure courses.

I currently teach the Langbein book in the final two or three classes of a course on the adjudicative phase of American criminal procedure.⁵ These classes are easy and fun. They permit a second look at issues considered throughout the course.

I begin with an opinion poll on the most obvious question, asking students to suppose that they have been transported to an international community on a space station orbiting the earth. I tell them that the community is to vote on which criminal justice system to adopt, the German or the American. Those, I report, are the only choices. No blending of the two systems is permitted, and England, Libya, and Iraq failed to make the run-offs. My polls usually have yielded clear (but never unanimous) results, though occasionally the division of the class has been close. In my eighteen years of sampling knowledgeable American students, however, the United States criminal justice system has never prevailed.⁶

After I have divided the class into two camps and learned where to look for divergent opinions, students consider the two systems from the perspective of each of the non-professionals with a role in criminal cases. They begin with an issue on which William Pizzi and Walter Perron recently wrote the definitive article: Which system provides better treatment to the victims of crime and to witnesses?⁷ Even the heartiest champions of the American system generally give Germany the edge on this issue. Next, the students consider in which system they would rather be a juror or lay judge. Finally, they discuss which system they would prefer as a defendant. As some student always suggests before long, the answer to this

⁵ At the University of Chicago, I devote two 65-minute classes to the materials. At other law schools, I have taught the materials in three 50-minute classes. Langbein's materials obviously are rich enough to justify more extended treatment, but I have been surprised at how much breadth and depth of coverage even a few classes permit.

⁶ Unlike Langbein's law review articles, his teaching materials do not grind obvious axes. Nevertheless, the author's admiration for German criminal justice may show and may color the results of my polls.

⁷ See William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996).

question may turn on whether one is rich or poor or guilty or innocent.⁸

Under each of these headings, the discussion moves from the lay actor's perspective to larger issues, and the course ends with an examination of the most important difference between American and Continental procedure. As William Pizzi's contribution to this symposium emphasizes, this difference is not appropriately characterized as the difference between "adversarial" and "inquisitorial" procedure. Although Americans may describe European justice as "inquisitorial," Europeans never do. In fact, the Spanish Inquisition ended long ago, and modern European systems are "mixed." Stated non-polemically, the issue is what degree of adversariness is appropriate and what independent responsibility for truth-finding judges should have.

Under this last heading, the class considers how the homicide case upon which Langbein focuses would be resolved in the United States. Although there is some room for argument about it, this case might be characterized as one of self-help justice with strong provocation, an upper-middle-class defendant, and a dubious defense. All of the American prosecutors with whom I have discussed the case would have charged the defendant with either first or second degree murder. Then almost all of them would have accepted a guilty plea to a greatly reduced charge, perhaps even to a misdemeanor. Many students criticize this seemingly schizophrenic treatment of the case through American plea bargaining. Many also doubt that a more adversarial American trial would have focused the issues more sharply or revealed more of the truth than the German trial. The issue turns out to be debatable, however. Some students have concluded that the German prosecutor's insufficiently adversarial approach to the case permitted the defendant to get away with murder.

In teaching from duplicated copies of an out-of-print book, I feel like a graybeard who refuses to update or abandon his ancient lecture notes. I do ask students to include in their course evaluations a line or two about whether I should continue to assign the book, and the great majority of students have been enthusiastic.

Langbein's book is, however, out of date, and it is useful to lecture briefly about recent developments. In recent decades, European and American systems have been converging or growing more alike. In civil cases, America has moved a bit toward the European model. This shift can be seen in enhanced pretrial judicial case management, in the trial and pretrial procedures of the *Manual for Complex Litigation*,⁹ and in the use of court-annexed arbitration and other alternative dispute

⁸ See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997).

⁹ MANUAL FOR COMPLEX LITIGATION (3d ed. 1995).

resolution techniques.¹⁰

In criminal cases, however, the convergence has proceeded almost entirely from the European side. At least in Germany, the criminal trial is longer and more adversarial than it was when Langbein wrote, and partly as a result, Germany can no longer be described in the way that Langbein described it in an article published a few years after his course materials. That nation is no longer a "land without plea bargaining."¹¹

Recent developments in Germany and elsewhere support an empirical proposition that I advanced almost twenty years ago, mostly on the basis of our own historical experience: "[T]he more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination. The simpler and more straightforward the trial process, the more likely it is that the process will be used."¹²

Of course substantial differences between European and American criminal procedure remain. Certainly nothing resembling the O.J. Simpson trial could have occurred in any European system.¹³ One significant difference is the greater willingness of European courts to consider probative evidence without regard to its supposed prejudicial impact and to permit witnesses to tell their stories fully. Paradoxically, the process of excluding evidence makes American trials vastly longer and more complicated than they would be if more relevant evidence could be heard.

One reason people were mortified by the Simpson trial was that the presiding judge took the American law of evidence seriously (more seriously than judges usually do). In this trial, there were more than 16,000 evidentiary objections,

¹⁰ See Albert W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

¹¹ See John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979). For English-language descriptions of later developments, see Thomas Swenson, *The German "Plea Bargaining" Debate*, 7 PACE INT'L L. REV. 373 (1995); Joachim Herrmann, *Models for the Reform of Criminal Procedure in Eastern Europe: Comparative Remarks on Changes in Trial Structure and European Alternatives to Plea Bargaining*, in CRIMINAL SCIENCE IN A GLOBAL SOCIETY: ESSAYS IN HONOR OF GERHARD O. W. MUELLER 61 (Edward M. Wise, ed., 1994); Joachim Herrmann, *Bargaining Justice – A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755 (1992).

¹² Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 42 (1979).

¹³ See Myron Moskowitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121, 1140 (1995). See also William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial*, 67 U. COLO. L. REV. 1027 (1996).

7,000 of which were sustained.¹⁴ Christopher Darden's memoir reports that, with the trial less than half over, "there had already been 430 sidebars. The jury had seen only 41 percent of the court proceedings. We were averaging two hours of jury presentation per day."¹⁵

Gordon Van Kessel's contribution to this symposium discusses one reason why European tribunals learn more of the facts than American tribunals do – their greater use of defendants as a source of evidence. But encouraging defendants to tell their stories is only one of many ways in which European procedure is more open and receptive than ours.

I will conclude with a news clipping that I think captures this basic difference in approach. It is from the *Chicago Tribune*:

From his hospital bed, an 81-year-old Hungarian immigrant pointed to a picture of the man who had viciously beaten him. Three weeks later, he died.

It was a picture of Lee Miller, who eventually was charged with murder. But the 12 jurors who heard the case never knew that the old man had identified Miller before he died.

Edward Gall's son and daughter, also Hungarian immigrants, couldn't understand this.

As they waited for the jury's verdict last week, they spoke of how unfair the criminal justice system seemed. Their father's killer might go free, they said, because of things the jurors couldn't hear, things just as damning as what they did hear.

Gall's children knew what the jury did not – that their father had pointed Miller out; that one of Miller's accomplices had named him as the killer; that Miller had a long history of violent crime and was not just the "derelict" his lawyer said he was.

"Why can't the jury know all this?" Gall's son asked.

The answer lay in the Bill of Rights and rules of evidence it spawned to protect the accused's right to a fair trial.

Those rules left prosecutors Nick Trutenko and Mary Ellen Cagney with one key witness: a convicted prostitute and admitted heroin addict.

She was Tamra Martin, 25, who testified that she set Gall

¹⁴ See Stephen A. Metz, *Comment: Justice Through the Eye of a Camera: Cameras in the Courtrooms in the United States, Canada, England, and Scotland*, 14 DICK. J. INT'L L. 673, 677 (1996).

¹⁵ CHRISTOPHER A. DARDEN WITH JESS WALTER, IN CONTEMPT 302 (1996).

up to be robbed. She said Gall had hired her as a prostitute and she planned to leave his door unlocked. Miller and a second man, Tiny Tim Gilbert, would sneak in and rob him. The old man, she said, was never supposed to know.

But things went wrong. Miller viciously attacked Gall, she said. She tried to pull him off, she said, then ran to Gilbert and pleaded with him to stop Miller.

It was too late. The old man's nose, jaw and cheekbones were broken. Both his eyes were black and a foot-long bruise ran across his chest. He would die of the injuries several weeks after the beating

During closing arguments Thursday, Miller's lawyer, public defender Richard Scholz, told the jury that Martin was a desperate prostitute trying to save herself by framing Miller in the death-penalty case.

"She sold herself to Mr. Gall," Scholz said. "She sold herself to police officers. She sold herself to these authorities and now they're asking you to buy what she's selling"

Gall's children shuddered. They feared the jurors wouldn't believe Martin, and Miller would go free.

"It must be difficult for them (Gall's children) to understand the system, especially coming from the background they do," Scholz said after the trial. "Lee Miller had the constitutional right to challenge the evidence against him, to have it brought before 12 people on a jury."

Gall's son and a police officer were at Gall's side when the old man pointed to Miller's picture. In some cases, a "dying declaration" is allowed as evidence because "as a person approaches death, they have no reason to lie," Scholz said.

But such a declaration is admissible only if the victim knows that death is imminent and, in fact, does die soon. Gall lived for three weeks after the identification. . . .

Gall's children couldn't understand why Tiny Tim Gilbert wasn't forced to face the jury. He earlier told police that he helped plan the robbery and that Miller killed Gall. . . .

The jury also knew nothing of Miller's record. He had a conviction for attempted murder in 1976 and an armed robbery conviction in 1973, said Trutenko. In 1983, while free on bond in the Gall case, he was arrested and convicted of burglary in Indiana. He escaped from prison there, went to California and was arrested and convicted of a sexual assault and robbery.

“Why don’t they tell the jury this?” Gall’s son asked. But a past criminal record cannot be used as evidence unless the defendant takes the witness stand, because it would unfairly bias the jurors against a defendant who is presumed innocent until proved guilty. A criminal background can be used only to help determine the credibility, not the guilt, of a witness.

Miller didn’t take the stand. As far as the jury knew, he was a 35-year-old “derelict”

The lawyers’ closing arguments covered the sparse circumstantial evidence but centered on Martin.

“Tamra Martin is trying to avoid the death penalty. . . . She has every reason in the world to lie,” Scholz told the jury. “Please don’t buy what Tamra Martin has to say. Please.” . . .

The jurors were out for two hours. They came back with the verdict: guilty. Gall’s daughter cried tears of relief, and his son smiled. Maybe this country’s justice system isn’t so bad after all, they said.¹⁶

Perhaps, as the victim’s children concluded, our criminal justice system isn’t so bad. Or perhaps what Rudolph Schlesinger wrote twenty-one years ago is even more true today: “[W]hen it comes to problems of criminal procedure, [American lawyers] are possessed by a feeling of superiority that seems to grow in direct proportion to the ever-increasing weight of the accumulating evidence demonstrating the total failure of our system of criminal justice.”¹⁷

¹⁶ Linnet Meyers, *Murder Trial Rules Baffle Victim’s Kin: Justice Follows Winding Course*, CHI. TRIB., Oct. 14, 1985, § 2, at 3.

¹⁷ Rudolph Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 363 (1977).

