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Publication Information & Recommended Citation

Lempert, Richard O. "Anglo-American and Continental Systems: Marsupials and Mammals of the Law." In *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska*, edited by John D. Jackson Oxford ; Portland, Or. : Hart, 2008

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*Anglo-American and Continental
Systems: Marsupials and Mammals
of the Law*

RICHARD LEMPert

WHEN PETER TILLERS invited me to participate in this *festschrift* for Mirjan Damaška, I proposed to write a short concluding essay reviewing the articles in this volume and drawing links between them. Perhaps I should have anticipated that this would be no easy task, and maybe even have foreseen that it was an assignment I would eventually shun. I should have known that there would not be the six to eight articles I anticipated but the 17 that have been submitted. Had I thought more, I would have realised that there would be many people, myself included, who would seek both to honour Professor Damaška and the opportunity to bask in his reflected glory. I certainly should have realised that there would be no easy way to summarise everything submitted, for Professor Damaška's academic *corpus* is too diverse and scholars' views of even the same works are too different to allow for any easy synthesis of contributions commenting on or inspired by Damaška's scholarship. Some see Professor Damaška as a leading comparativist, some admire him for his work on criminal procedure and some, myself included, view Professor Damaška as an outstanding evidence scholar, who has managed the all too rare accomplishment of bringing truly new ideas to the study of evidence and procedure. Fortunately what daunted me did not daunt John Jackson and Maximo Langer, for they have, in their introduction, done a superb job of pulling together the separate themes of this volume's contributions, although I will point out that not even they could unify the articles herein under a single theme.¹

¹ J Jackson, M Langer, ch 1.

So if I am not to attempt a synthesis, what can I contribute? First, I simply want to add to the chorus of admiration for Professor Damaška. My admiration for him goes back to the first work of his I read, his path-breaking book *The Faces of Justice and State Authority*. I had read nothing like it before, nor, I might add, have I seen its equal since. It is one of those rare works that allows one to see what are familiar issues, in this case differences between Anglo-American and Continental legal systems, in a new light. Once viewed in this light, matters are never the same. In particular, by breaking down what had become fixed and sterile portraits of adversarial and inquisitorial systems, Professor Damaška helped his readers perceive and make sense of variations within and common features across Anglo-American and Continental justice systems. He did so by highlighting features that were either imperceptible or puzzling when viewed from within the confines of the received adversarial-inquisitorial dichotomy.

Professor Damaška first learned law abroad, and English is a second language to him. His work on comparative evidentiary and procedural law thus builds on certain (dare I say ‘unfair’) advantages Professor Damaška has over most of us who labour in evidence law’s vineyards. He has a deep knowledge of Continental legal systems and the contexts in which they function, a level of knowledge to which few Americans even aspire. Also he writes English far better than almost all who acquired the language at a mother’s knee. The freshness of his insights is matched, and perhaps enabled, by the freshness of his prose. For example:

To consider forms of justice in monadic isolation from their social and economic context is – for many purposes – like playing *Hamlet* without the Prince.²

and

Yet because [the opposing lawyer’s] accounts are contrary in nature, the initial polarity created by the two evidentiary scenarios is preserved. Thus, as in a car driving at night, two narrow beams continue to illuminate the world presented to the adjudicator from the beginning until the end of trial.³

What American-born legal academic would, or could, write this way?

By receiving his initial legal training abroad, Professor Damaška avoided the downside of being taught to ‘think like a lawyer’. Rather his thinking has been shaped by what he has observed and not by any ends he has aimed at. His is a Holmesian view of law, based on observation and experience; not logic. One reason Professor Damaška’s insights are fresh is that he makes no attempt to fit Continental and Anglo-American legal

² M Damaška, *The Faces of Justice and State Authority* (New Haven, Yale University Press, 1986) 7.

³ M Damaška, *Evidence Law Adrift* (New Haven, Yale University Press, 1997) 92.

systems into any boxes other than those boxes into which they seem empirically to fit best. Indeed, the Damaška who wrote *Faces of Justice* is more of a sociologist than a lawyer. Only those who confuse empirical analysis with quantitative data would not recognise this, for *Faces of Justice* is empirical at its core. It tells a sociological story linking the structure of legal procedure, and especially the trial, with the development of political authority and the goals of states. The theses it advances are not rigorously tested in accord with the canons of social science, but their broad outline so well fits facts we think we know that it is easy to find Professor Damaška's narrative compelling.

I hesitate to tread the fields Professor Damaška has sown, for my knowledge of comparative law and of European legal procedure pales next to his, but the temptation to follow Professor Damaška's example and think sociologically about the structure of the Anglo-American and Continental legal systems is more than I wish to resist. Like Professor Damaška, I shall construct, but cannot rigorously test a sociological narrative of how Anglo-American and Continental legal systems function, but my starting point will be even further removed from the on the ground details of Anglo-American and Continental legal systems than Professor Damaška's ideal types, and my approach will suggest even more room for contingency in shaping the details of Anglo-American and Continental legal systems than his does. Without any necessary inconsistency with Professor Damaška's theorising, the perspective I shall offer will help explain why, as Professor Damaška recognises, his ideal types break down and overlap in practice. Also, the perspective I offer allows some speculation about how legal systems might develop in an increasingly international and global world.

To speak metaphorically, the Anglo American and Continental legal systems are the marsupials and mammals of the legal world. Because physical separation limited their competition with each other, marsupials in Australia and mammals in most of the rest of the world long ago took separate evolutionary paths. At the same time, despite local dominance, neither reproductive form entirely excluded the other. Viewed in one way marsupials and mammals are profoundly different; after all what is more fundamental than the developmental stage at which the young enter the world and the ways in which they are protected and nourished as they grow to self-sufficiency. Moreover, some life forms are unique to each – compare the kangaroo with any mammal of similar size, and remark on the lack of marsupial elephants. Yet in other ways many marsupials native to Australia are remarkably similar to mammals born elsewhere. Where ecology made the same demands, or offered the same opportunities, for survival, species that mirrored each other, like the marsupial thylacine and the mammal wolf, developed. Despite fundamental differences in reproduction and some surface differences in appearance, where marsupials and

mammals such as these filled the same ecological niche, they adapted in similar ways and shared the phenotypical characteristics most necessary for survival.⁴ In similar fashion Anglo-American and Continental modes of trial and legal action have developed, or so I shall argue, to fill similar niches. Despite obvious and in some ways deep differences in premises and appearance, to the extent that similar demands have been placed on them, Continental and Anglo-American legal systems have much of what matters most in common.

Professor Damaška in *Faces of Justice* spotlights differences in Continental and legal systems engendered by differences in the social ecology and histories of the states that spawned them. I shall focus on states more as societies than as political actors and from this perspective point to fundamental similarities in the Anglo-American and Continental systems, with particular attention to how cases are decided. More speculatively, I will question whether the association between state authority and ways of trying cases trials that Professor Damaška *Faces of Justice* illuminates is a necessary one. Perhaps Professor Damaška's more centrally-driven Continental states could have functioned well with a judicial system that looked much like the non-hierarchical conflict resolving Anglo-American approach to trial justice, while the latter states could have coupled their more diffuse vesting of political power with a more hierarchical policy-oriented judiciary. Looking at existing practice one can only say that Professor Damaška tells a powerful story about why the association he posits is the more probable one. It is impossible to prove from the data at hand whether the association is necessary rather than plausible or likely. Indeed, I would not be surprised if a scholar as gifted as Professor Damaška could tell an opposite but equally convincing story were the facts on the ground reversed.

The perspective I shall write from is functionalism, an approach to understanding society that is seen as outdated by many American sociologists, although it has greater currency on the Continent.⁵ It is also the perspective most consistent with Professor Damaška's approach to explanation in *Faces of Justice*. Functionalism is teleological in nature because it seeks to explain social norms and structures by the ends they serve.⁶

⁴ Wikipedia explains: 'An example of convergent evolution, the Thylacine showed many similarities to the members of the Canidae (dog) family of the Northern Hemisphere: sharp teeth, powerful jaws, raised heels and the same general body form. Since the Thylacine filled the same ecological niche in Australia as the dog family did elsewhere, it developed many of the same features. Despite this, it is unrelated to any of the Northern Hemisphere predators — its closest living relative is the Tasmanian Devil (*Sarcophilus harrisii*).' <<http://en.wikipedia.org/wiki/Thylacine>> accessed 19 June 2008.

⁵ See, eg, N Luhmann, *Social Systems* (Stanford, Stanford University Press, 1995).

⁶ See A Stinchcombe, *Constructing Social Theories* (Chicago, University of Chicago Press, 1987) ch 3.

Because it most often seeks to plausibly explain the status quo, functionalism is often regarded as a conservative approach to social analysis, but functionalism is more properly seen as an analytic perspective that entails no normative approval of the status quo, and a functional analysis need not be conservative in its implications. Functionalism is also sometimes regarded as circular, for the persistence of an institution is evidence that it fills an important social function. There is more substance to this claim than to the claim that functionalism is necessarily conservative, but this does not mean the functional perspective is wrong, nor does it exclude the positing and testing of hypotheses about the roles institutions play in society and the implications of change or variation in institutions.

Functional theory is associated most prominently with the work of the American sociologist Talcott Parsons.⁷ Parsons posited that there were four basic functions that a society, and the core institutions within a society, had to fill in order to survive. These were captured by the acronym AGIL, which stands for adaptation, goal attainment, integration and latency or, more commonly and more revealingly, pattern maintenance. At the societal level the economy was the core adaptive institution, the polity was core to goal attainment, cultural systems were fundamental to pattern maintenance and value systems, including especially legal institutions, were core to integration. No institution is, however, exclusively concerned with its associated core function. Economic, political and cultural systems also contribute to societal integration just as legal institutions contribute to adaptation, goal attainment and pattern maintenance.

What Parsons' functional perspective implies for the current discussion is that even if approaches to dispute processing on the Continent and in Anglo-American systems appear different, they each must efficaciously achieve similar ends relating to the binding of society together. To the extent that Continental and Anglo-American states exist in similar environments and face similar challenges, their legal systems will have to solve similar problems of social integration, and similarities in how they go about doing this can be expected even if, like marsupials and mammals, structural differences are apparent and in some ways fundamental. The functional perspective also suggests that the role and characteristics of the legal system will turn in part on the degree to which other institutional sectors contribute to social integration because what is crucial is meeting the systems' functional needs and not the particular way these needs are met. Thus, as Stewart Macaulay long ago showed, lawyers seldom play (or played) a major role in resolving business disputes, and litigation between businesses that deal regularly with each other is rare. This is because

⁷ For a general statement of Parson's approach see T Parsons, *The Social System* (Glencoe, Free Press, 1951).

economic incentives motivate parties to preserve their relationship, while litigation and its threat are likely to end it.⁸ Similarly the rule of law largely disappears in some dictatorships because, for a time at least, brute force and the threat of force can maintain social integration. It is the implications of this functional perspective for comparative legal analysis that I wish to pursue here.

If the Continental and Anglo-American judicial systems play the same functional role in their various societies, one can expect that despite visible differences, there must be important respects, and perhaps the most fundamentally important respects, in which they are similar. For starters, as instruments of adjudication, courts are primarily concerned with resolving disputes in ways that will generally be regarded as legitimate. In post-Enlightenment Western societies this means that disputes must be resolved in accordance with pre-established legal norms by unbiased decision makers who have rationally evaluated the evidence available to them. In both the Anglo-American and Continental legal systems the norms brought to bear on disputes are in principle known in advance. In Continental systems this is obvious because the norms courts apply are embodied in legal codes. In the Anglo-American world the situation has seemed to some observers, particularly Continental observers, less clear, for only some norms that courts apply are embodied in codes while others are embedded in precedent. Moreover, Anglo-American systems assign key law-applying tasks to the jury, which Continental scholars, at least since Weber, have regarded as 'irrational', not in the sense of being crazy but in the sense of not following consistent rules.⁹

The differences between the two systems on these dimensions are, however, more apparent than real. In each system many fundamental norms, particularly norms regarding matters treated by the criminal law, track popular norms about right and wrong behaviour. In each system other norms may be poorly publicised or ambiguous as applied to certain facts, but they are not unknown or unknowable. Rather, professional legal training is thought to allow those so trained to identify and interpret relevant law through the investigation of codes, prior applications of the norms and canonical commentaries, which tend to be treatises in the Continental systems and high court pronouncements, including dicta, in the Anglo-American legal world. Juries, at least in theory, do little to change this situation, for they are not in the business of deciding what the law means. Their task is rather to find facts and state the legal conclusion

⁸ S Macaulay, 'Non-Contractual Relations and Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55–69.

⁹ M Weber, M Rheinstein (ed), *On Law in Economy and Society*, (Cambridge, Harvard UP, 1954). See also A Kronman, *Max Weber* (Stanford, Stanford UP, 1983) and D Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) *Wisconsin Law Review* 720.

these facts portend, given what they have been told about the law. While juries can and do lighten the law's commands with their sense of what is moral or just, the evidence since Kalven and Zeisel's path-breaking research¹⁰ is that by and large juries take their legal role seriously and seldom render decisions that are legally indefensible.

A second similarity, also closely tied to concerns for legitimacy, is that both the Anglo-American and Continental systems are concerned with judicial competence and unbiasedness. In the Anglo-American system professional legal training, experience as a lawyer and modes of judicial selection are seen as guarantors of judicial competence, while the common sense of ordinary citizens and the virtues of group deliberation are presumed to make juries capable of rationally judging the facts before them. In Continental systems, judicial competence is guaranteed by extended professional training designed explicitly to produce judges, by the structure of judging as a professional career and by multi-judge and mixed professional/lay judge courts, especially in important cases. Unbiasedness is guaranteed in the American system by norms that separate the judiciary from the 'political' branches of government, by rules for judicial recusal and by allowing litigants to vet jurors and challenge those whose neutrality seems questionable. In the Continental system, making judging a career track separate from prosecution and private lawyering, together with professional judicial training, is thought to promote judicial neutrality along with competence.

In neither system need the assumptions of competent and impartial judging always hold. From a functional standpoint all that matters is that people ordinarily believe they do. If people believe courts are fair and competent, the judicial resolution of disputes will be presumed legitimate, allowing courts and the law to play the integrative role that state and society require.

A third element essential to the legitimacy of court verdicts and hence to the likelihood that legal institutions will fill their integrative function is the requirement that court decisions be based on the rational evaluation of reliable evidence. This too is a demand placed on both Anglo-American and Continental legal systems, but ideas about what evidence is reliable and what it means to evaluate evidence rationally may vary with location and over time. For example, in England before 1215 belief in the reality of divine intervention made trial by ordeal and trial by battle apparently

¹⁰ H Kalven Jr and H Zeisel, *The American Jury* (Chicago, Univ of Chicago Press, 1966). Although the Kalven and Zeisel study was done some years ago, its results have held up well over time. See, eg, N Vidmar and V Hans, 'The American Jury at Twenty-Five Years' (1991) 16 *Law & Social Inquiry* 323; see also T Eisenberg *et al*, 'Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's *The American Jury*' (2005) 2 *Journal of Empirical Legal Studies* 171.

rational ways of determining guilt and deciding legal disputes. After 1215, however, when decrees of the Fourth Lateran Council barred priests from giving ritual blessings as preludes to common ordeals and trial by battle, these modes of resolving disputes fell out of favour in England, although trial by ordeal had surprising persistence on the Continent. The two systems also differed in the weight they were willing to give confessions obtained through torture and hence in their use of torture to secure confessions.

Post-Enlightenment, there has been considerable convergence about what it means to decide a legal claim rationally and, I would argue, for a long while there has been no great difference between Continental and Anglo-American systems on this score. Both systems presume there is a true state of affairs that can be best determined by first collecting reliable evidence that bears on the existence of whatever state legal norms problematise, and then dispassionately evaluating that evidence in light of what is known about how people act and how the world works. The systems do, however, differ somewhat in their judgments of the relative reliability of kinds of evidence, and they differ even more in the processes that they see as most conducive to the marshalling and rational evaluation of evidence.

Hearsay is the iconic example of how systems can differ in their judgment of what evidence is reliable. Hearsay is presumed barred in Anglo-American systems and allowed on the Continent. In practice, however, differences in the treatment of hearsay are not that great. Anglo-American evidence law has proliferated exceptions that admit hearsay, and even where exceptions do not neatly fit statements offered, trial courts will often find some way to admit hearsay that judges think reliable. Continental systems, on the other hand, often treat hearsay with suspicion, discounting it when it is not corroborated by other evidence, and in one Continental system, Italy, theoretical barriers to admitting hearsay appear similar to what they are in the United States and England. This convergence is not surprising, for there is little reason to believe that hearsay is, in fact, more or less probative depending on whether it is gathered in England, in the United States or on the Continent, nor is there reason to believe that experience with hearsay will lead Anglo-American and Continental thinkers to differ substantially in their views of the probative force of particular pieces of hearsay evidence. If the probative value of a hearsay statement is likely to seem similar to Continental and Anglo-American observers, the functional perspective suggests that there will be considerable on-the-ground similarity in how that statement is treated despite different traditions. Giving weight to apparently reliable hearsay and discounting or refusing to consider unreliable hearsay is

impelled by a common rationalist commitment to the evaluation of reliable evidence and by the relationship of this commitment to the legitimacy of judicial verdicts.

When we move beyond issues of fundamental fairness and basic epistemological requirements for rationally evaluating evidence to the procedures that are most likely to promote the fair and rational evaluation of evidence, there is considerable room for historically (that is, path dependent) and culturally rooted differences in how Anglo-American and Continental systems gather and present evidence and adjudicate cases. This is possible because there is 'more than one way to skin a cat'. A variety of different approaches to adjudication may yield results that are in the aggregate sufficiently fair and rational to be accepted by parties and observers and hence to allow legal institutions to play the integrative role that Parsonian systems theory demands. Partisans of one system or the other may present reasoned arguments why their favoured approach to adjudication should be preferred, but to date no one to my knowledge has ever shown empirically that one system produces more accurate verdicts than the other, is less likely to convict the innocent or favour more powerful parties or is more likely to yield verdicts that meet with widespread popular resistance. Indeed, it is the absence of empirical evidence that allows disputes between partisans of the Anglo-American and Continental systems to flourish.

Most commentaries on comparative procedure, including *Faces of Justice*, focus not on the system-level contributions that legal institutions make to social integration but rather on differences in the rules and behavior that govern court cases. These differences appear stark. The Anglo-American system in its purest form believes that a group of unbiased lay people (that is, a jury) exposed to the evidence and arguments that opposing parties think most support their positions is the best means of determining where truth in litigation lies. It also believes that with proper instructions the jury can state the legal implications of the facts they have found.¹¹ The Continental system in its purest form has treated the truth as unitary and proceeds on the assumption that the judicial discovery of the truth best proceeds in a unitary fashion. Thus the iconic figure in Continental jurisprudence is the investigating judge who himself seeks out evidence and follows it, wherever it leads, to discern the truth.

¹¹ The belief that juries exposed to conflicting stories can find facts accurately enjoys considerable research support, but faith in the jury's ability to understand the meaning of instructions and to correctly apply the law, as explained in the instructions, to the facts at hand rests on shakier ground. For a synthetic overview of the jury's strengths and weaknesses in finding facts and applying the law see N Vidmar and VP Hans, *American Juries: The Verdict* (Amherst, Prometheus Press, 2007) ch 7.

The usual practice on the Continent is different. In criminal cases, an investigating agency, analogous to the police/prosecution pairing in Anglo-American systems, prepares a dossier setting forth the facts uncovered. The court then uses this dossier, perhaps supplemented by testimony from and questioning of the accused, a complainant and expert or other witnesses, to decide the case. On the civil side yet more is left to the parties. Unlike the Anglo-American system, where the jury has long been a favourite research subject, there has been little empirical scholarship on the ability of Continental courts to reach fair and accurate trial decisions.¹² What little research exists focuses mainly on whether lay judges in mixed court systems have substantial independent influence on the cases in which they sit. The answer with respect to verdicts has been a resounding ‘no’, although some work has suggested that lay judges may have more of an influence on sentencing decisions than they do on verdicts reached.¹³

Another iconic difference between the Anglo-American and Continental systems is that trial courts on the Continent give reasons for their decisions while Anglo-American courts do not do so when trial is to a jury. In discussing the relative merits of the two systems with Continental scholars and their Anglo-American sympathisers, this difference is often presented to me as trump by those who assert the superiority of Continental-style adjudication by professional judges. Indeed, many Continental observers

¹² This is my impression, but I have not searched the foreign literature, and there may be research on the fairness and accuracy of professional judges I do not know about. Machura touches on this issue in a survey of lay assessors in two German cities: see S Machura, ‘Interaction Between Lay Assessors and Professional Judges in German Mixed Courts’ (2001) 72 *International Review of Penal Law* 451. He reports that 84% of the lay assessors he interviewed in one city and 79% of those he interviewed in the other thought that the verdicts in the cases they sat on were either ‘very’ or ‘quite’ just. I would not give too much weight to survey data of this sort in assessing the competence of professional judge or mixed tribunals.

¹³ The first study published in English to document this that I know of is G Casper and H Zeisel, ‘Lay Judges in the German Criminal Courts’ (1972) 1 *The Journal of Legal Studies* 146–191. Their finding that lay judges on mixed courts almost always have the same verdict preferences as the professional judge or judges has been replicated by a number of other scholars. Indeed, in some courts the lay judges are known as ‘nodders’ because they seem to do little more than nod their heads in agreement with the professional judge or judges. A recent study based on a survey of lay judges who sat in lower criminal courts in two German cities by the sociologist Stefan Machura presents a more nuanced view of the situation but the study does not seem to differ greatly from the received knowledge in its bottom line: see *Ibid.* Machura documents various structural reasons that serve to limit the influence of lay judges, such as their ignorance of the case before it begins and the ability of the professional judge to negotiate what Americans would call ‘plea bargains’ without consulting their lay counterparts. He also notes the large degree of agreement between lay and professional judges, but in doing so he cites survey responses that indicate that lay judges feel they have had some influence on proceedings by influencing the professional judge’s views. He notes, however, that the influences his lay respondents report may be slight and that professional judges prefer informal proceedings to formal voting. Keeping things informal help a professional judge keep control of the deliberations, making it difficult to know when lay judges have influenced proceeding and, in particular, whether their presence resulted in a verdict different from that which the professional judge or judges sitting alone would have reached.

find it hard to imagine a modern legal system that can pronounce verdicts without giving reasons. The difference seems to me, however, to be overdrawn. First, jury decision-making is not necessarily antithetical to reason-giving. Even though the Anglo-American jury does not provide reasons for its decisions, some countries that have adopted jury systems have required their juries to give reasons,¹⁴ and in the United States the use of special verdict forms that specifically probe the facts the jury found is not uncommon, especially in civil cases. Second, and more importantly, reasons for jury verdicts are often transparent if one cares to look. The jury are told that they can only find for the moving party (plaintiff or prosecution) when certain facts hold. When a verdict is for the moving party, the reason is obvious: The jury believed all the facts necessary for the plaintiff or prosecution to prevail. If, for example, conflicting testimony was given on a crucial point, then the jury must have believed the testimony of the party that had to prove the point to win. Matters are less transparent when verdicts are for defendants, but at least we know that some facts essential to the plaintiff's or prosecution's case were not shown to the requisite degree of proof.

It may be objected that a jury may not have actually found crucial facts in the way their verdict implies, and that if they gave reasons for their verdicts, as judges do on the Continent and in bench trials in the United States, this would be known. The comparison here, however, assumes that judges' reasons accurately reflect how they assessed the evidence and what motivated their decisions. Judges are smart people, familiar with the law. They know what reasons will support a verdict and which will not. Hence, whatever a judge thought of the evidence and whatever motivated a decision, a judge is unlikely to craft an opinion that rests the verdict on an unsupported ground. Indeed, reason-giving is open to abuse. I recall one conversation with a European judge who told me that on the rare occasions where his opinion did not prevail on a mixed court, he might write an opinion that would lead the appellate court to reverse the decision that he was, in theory, advocating.¹⁵ Jurors, of course, do not have professional legal knowledge, and if they had to specify the reasons for their verdicts, they might well offer unacceptable justifications, sometimes because their reasons were in fact unacceptable and sometimes because

¹⁴ SC Thaman, 'Europe's New Jury Systems: The Cases of Spain and Russia' (Spring 1999) 62 *Law and Contemporary Problems* 233. Austria, like Spain, requires its juries to give reasons for their verdicts.

¹⁵ Even when the lay judges' views have prevailed over that of the professional judge on a mixed court the task of laying out the reasons for the verdict is typically assigned to the professional judge. Because mixed courts often strive to reach an informal consensus rather than bring matters to votes, it may be that the lay judges will not realise they have not persuaded the professional judge to their views, so they will not suspect that a judge might try to subvert their verdict through the opinion he writes.

they did not know how to convey clearly what motivated them.¹⁶ The fact that we do not learn when a jury has relied on unacceptable reasons does not mean that juries are less faithful to the law than a judge who might reach a verdict unsupported by the facts or law, but who knows enough to disguise this in an opinion.

The requirement that Continental courts provide reasons does, however, have an important functional implication. Together with the dossier that accompanies the case, written reasons allow an appellate court to overturn a verdict below by rejecting the trial court's reasons and substituting its own judgment. In this sense the Continental system serves well the hierarchical bureaucratic state that Damaška describes in *The Faces of Justice*. But hierarchical control is not something that only Continental governments want or need. Any modern state seeks significant control from the top. Anglo-American courts too have means that allow higher courts to supervise the verdicts of trial courts and ensure that trial court verdicts are acceptable. They can use the rules of evidence to this end. Almost every trial contains some evidentiary error, for shortcuts are often taken in the presentation of evidence, and admissibility decisions are often based on rules of thumb rather than on a close technical analysis of what is and is not admissible. The upshot is that when an appellate court wishes to overturn a verdict below, it can invariably find some justification. Conversely when a higher court does not wish to disturb a verdict, it can ignore evidentiary error or recognise error but find it harmless.

From a functional standpoint it would appear to be no accident that rules of evidence began to arise in England at about the time that other, more direct means of jury control, such as actions of attainr brought against jurors who did not decide as the Crown through its judges wished, were disappearing. No state can afford to trust decisions about the exercise of its coercive power entirely to the masses, and although the jurors who were eligible to sit on cases in the 17th, 18th and early 19th centuries were by no means 'the masses', they were an element beyond direct hierarchical control.¹⁷

Overturing verdicts for evidentiary error is, to be sure, a clumsier way of exercising hierarchical control than the substitution of judgment which the review of a case dossier in light of a trial court's reasons allows. What makes it inefficient is that the standard remedy for evidentiary error is to remand the case for a trial in which the error will be corrected, and there is no guarantee that a verdict an appellate court wished to reject will be

¹⁶ We see something like this when jurors are given verdict forms that require them to respond to specific questions. Occasionally the answers they give are inconsistent or do not support the verdict they render.

¹⁷ See, eg, *Bushell's Case* (1670) 1 Freem 1, and Vaughan 135.

different because an evidentiary error is avoided on retrial.¹⁸ At least in the United States, however, appellate courts are becoming more adept in substituting judgment even when they are reversing for evidentiary error, most commonly in cases involving scientific evidence where they opine that without the evidence they have found wrongfully admitted, the party proffering the evidence has no case. Moreover, even when an appellate court does not mandate a result, remanding for evidentiary error may predictably result in a party's decision not to pursue the case further or may stimulate a compromise verdict that the appellate court would have found acceptable.

In the United States, however, there is an important exception to the power that appellate courts gain through their ability to reverse for evidentiary error. When an accused criminal is acquitted, he cannot be tried again on the same charge even if the acquittal would not have occurred but for a trial judge's error in admitting or excluding evidence. It might seem that criminal cases are where hierarchical control would most matter to those with state power. This may well be true, but juries have seldom posed substantial obstacles to the exercise of hierarchical control. Most criminal charges have no implications beyond their outcomes, and where charged crimes have a political dimension convictions are often easy to come by because jurors ordinarily share the views and prejudices of the authorities who have ordered the prosecution. Acquittals are most likely in situations where substantial public sentiment, although not necessarily majority sentiment, favours the accused. Acquittals in these cases may, ironically, do more to defuse tensions and allow the peaceful maintenance of state authority than would follow from the convictions the state seeks. In a less democratic society matters might be different, for in such states legitimacy may play a lesser role than minimally disguised power in maintaining the government.

Lest I be misunderstood, let me make state clearly that the fact that appellate courts can exercise hierarchical control by reversing trial verdicts for evidentiary error does not mean that the Anglo-American and Continental systems are equally effective in enabling hierarchical control. Thus, I am not disagreeing fundamentally with Professor Damaška's analysis. Rather, my point is that even if law's contribution to social integration is functionally necessary, a social system can persist with contributions toward this end that fall considerably short of perfection. The degree to

¹⁸ Thus, the United States Supreme Court twice reversed verdicts for Sallie Hillmon in her famous law suit against the Mutual Life Insurance Company, apparently feeling that she was engaged in insurance fraud and that a jury had mistakenly believed her story. But Ms Hillmon eventually received most of what she claimed due. For a fascinating account of this case, and a suggestion that it was the Supreme Court rather than two juries that was mistaken on the facts, see M Wesson, 'The Hillmon Case, the Supreme Court and the McGuffin' in R Lempert (ed), *Evidence Stories* (New York, Foundation Press, 2006) 277–305.

which institutional arrangements facilitate particular outcomes may, however, tell us something about how important that outcome is to the system in question. A strong jury system is, for example, not necessary to democratic government just as it is not incompatible with considerable hierarchical control, but at some point system demands may mean that jury justice cannot be tolerated. A likely example is post-Communist Russia. Jury trial was an early and popular reform as Russia moved toward democracy. But allocating real power to juries became less tolerable as the Russian state under Putin became a far more hierarchically directed and authoritarian regime. Thus it is not surprising that since Putin's advent, jury justice has been largely gutted, and in any case where central authorities seek to achieve certain results, they can do so regardless of what a jury might decide at trial.¹⁹

A third important difference between the Anglo-American and Continental legal systems is the difference between entrusting evidence gathering to an investigating judge or an agency charged with reporting all the relevant evidence it finds (whichever way it cuts) and leaving the gathering and presentation of evidence to adversarial parties. Both systems arguably respond to the same functional requisite: that the collection and presentation of evidence be handled in a way that seems fair and allows for rational judgments based on reliable facts. Seen in this light, the difference between the systems appears small, for each allows considerable evidence to be amassed for presentation to the court. The Continental system not only entrusts evidence gathering to a person or agency that is nominally neutral, but it also provides ways for the parties to add to or influence the information included in the dossier and to add to that evidence in court proceedings. The Anglo-American system²⁰ is seemingly different, for evidence gathering is entrusted to the parties and they are, with rare exceptions, expected to assemble and present only that information that helps their cases. But the situation on the ground is not the private knowledge situation that exists in theory. Parties commonly agree to or are required to share considerable information. In civil cases by the time a case reaches trial a party through discovery will know the opposing party's legal theories and almost all the evidence that will be offered to support them. Defendants in criminal cases know specifically what they are charged with,

¹⁹ Compare Thaman, above n 12, with SC Thaman, 'The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond' (2007) 40 *Cornell International Law Journal* 355. See also Stephen C Thaman, ch 6.

²⁰ I know far less about what occurs in Britain and her former colonies than I do about how matters proceed in the United States, so what I write below may be truer of the American legal system than of Anglo-American systems in general.

and through preliminary hearing testimony, the receipt of *Brady* material,²¹ their own contact with the state's witnesses and informal information sharing with the prosecution often begin trial with considerable knowledge of the case the state will present. At one time, the prosecution had no reciprocal access to the defendant's evidence or planned trial strategy, but increasingly the defendant must reveal information in order to acquire information in the state's possession, and defences most likely to surprise the state or to require advance preparation to counter, like alibi defences or the insanity defence, often must be noticed in advance of trial.

State authority would most likely be undercut if too many criminal defendants were acquitted, for this would cast doubt on the fairness and effectiveness of a state's social control mechanisms and suggest a state was not adequately protecting its inhabitants. But both Anglo-American and Continental systems have mechanisms to ensure that too many acquittals do not happen. Most important is the resource advantage the state enjoys over all but the wealthiest criminal defendants. Thus in both Anglo-American systems and on the Continent criminal cases are typically characterised by such an imbalance of evidence that defendants are persuaded either to plead guilty or, if guilty pleas are technically unavailable, to refrain from mounting substantial defences. Foregoing a meaningful defence is not necessarily bad, for a meaningful defence may not be available. The state's evidence is presumably overwhelming because the defendant is overwhelmingly likely to be guilty.

We can, however, ask whether this presumption necessarily holds. Recent studies in the United States have indicated that in a troublesome proportion of cases where defendants were convicted of rape or murder, which are the most seriously punished ordinary crimes, the defendants were in fact innocent when they stood trial.²² It would not be surprising if false conviction rates were similar in England and on the Continent.²³

²¹ *Brady* material is significant exculpatory material that the state uncovers in its investigation which it is required to turn over to the accused. *Brady v Maryland* (1963) 373 US 83.

²² HA Bedau and ML Radelet, 'Miscarriages of Justice in Potentially Capital Cases' (1987) 40 *Stanford Law Review* 21; SR Gross, K Jacoby, DJ Matheson, N Montgomery and S Patil, 'Exonerations in the United States 1989 Through 2003' (2005) 95 *Northwestern Law Review* 529–533; MD Risinger, 'Convicting the Innocent: An Empirically Justified Wrongful Conviction Rate' (16 September 2006), available at SSRN: <<http://ssrn.com/abstract=931454>> accessed 19 June 2008; SR Gross and B O'Brien, 'Frequency and Predictors of False Conviction: The Problem, and Some Data on Capital Cases' unpublished manuscript on file with the author [2007]. Estimates of the proportion wrongfully convicted range from about 2% to about 5%.

²³ Anecdotally, support for juries in Japan and the country's eventual move to mixed courts was stimulated by two cases in which defendants sentenced to death were later proven innocent. There is similar anecdotal evidence of wrongful convictions in Great Britain, but I know no systematic attempts to identify the wrongfully convicted in either country or in any other country in Europe.

The kinds of misleading evidence that in the United States result in wrongful convictions, such as mistaken eye witness identifications, faulty forensic science and psychologically coerced confessions, are also likely to play an important role in English and European trials. Other structural problems also conduce to error by diminishing the likelihood that faulty evidence will be refuted. Criminal defence counsel in the United States are often over-worked, under-compensated or simply incompetent; funds for experts to check the state's forensic science evidence are limited if they exist at all; and once the police or prosecution decide to arrest a person they have strong professional incentives to make the arrest stick. I don't know of research that documents similar shortcomings in Continental justice systems, but I would not be surprised if similar systemic biases and deficiencies exist. I say this not just because psychological and organisational limitations are not bounded by the Atlantic Ocean but also because criminal justice systems lose legitimacy when they do not solve crimes and secure the convictions of those who are officially claimed to have 'done it'.

My thesis to this point is that if we focus not on how Anglo-American and Continental legal systems ideally go about their judicial business but on the relationship between legal systems and social integration, we see that the two systems face similar challenges and in large measure operate under similar post-Enlightenment constraints. Although the systems have devised somewhat different mechanisms for meeting those challenges, like the thylacine and the wolf they have evolved to do much the same thing. Seen in this light, Professor Damaška's observation that the pure systems of his ideal types are nowhere to be found is expected rather than remarkable. There is no reason why bench trials should not be common in the United States and Britain or why some judges should not ask their own questions of witnesses, or freely admit hearsay evidence or appoint court experts. Similarly no functional necessity precludes Continental systems from giving parties a role in developing evidence, using juries in some cases or regarding hearsay with such suspicion that it is ignored entirely.

The Anglo-American and Continental systems are not pure manifestations of the ideal types Professor Damaška gives us²⁴ because they don't have to be. What they do have to be are generally acceptable ways of deciding cases, which in today's world means they should be based on the apparently rationale and unbiased evaluation of reliable evidence. So long as these requisites are met, judicial dispute resolution will contribute to social integration.²⁵ Nothing about the functional role of courts means there is only one way they can fill their function.

²⁴ This is a fact Damaška not only recognises but highlights.

²⁵ I have in this chapter focused on courts and how their adjudicative activities contribute to social integration. This is by no means the only way in which legal institutions play an integrative role in society. Contract law, for example, is crucial to economic coordination.

Given this functional leeway, it is not surprising that *within* both the Anglo-American and Continental legal worlds, systems of evidence gathering and adjudication have evolved differently and that what seems to be a unitary Continental or Anglo-American tradition when viewed from afar has long dissolved into a set of country or even locality-specific practices when viewed close up. One need only compare Dutch, French, Italian and German legal proceedings now or even 50 years ago to appreciate this. Nor is it surprising that within systems differentiation is ongoing. Italy's adoption of a hearsay rule similar to that of the United States is a Continental example of divergent evolution within a tradition while Great Britain's abolition of once available jury trial rights in cases where they remain available in the United States is a similar example on the Anglo-American side.

Moreover, I expect that the breakdown of the Continental and Anglo-American ideal types will only accelerate. Increased international interchange promotes borrowing across traditions, for such interchange means that legal elites develop a better appreciation of alternative ways of case processing and that ordinary people, through the media, travel and other sources, find that what was once an entirely alien approach to legal action has some familiarity. Taking an evolutionary perspective, I would expect borrowing across traditions to be most likely where aspects of the Continental or Anglo-American tradition seem functionally superior to received ways of doing things. A Continental example of such borrowing may be the increased role for defence counsel in questioning the state's evidence and ensuring that evidence favourable to the defendant is part of the case record. An Anglo-American example is the increased responsibility placed on trial judges to monitor the quality of scientific evidence and an apparent increase in the willingness of judges to appoint neutral court experts. Both examples of borrowed procedure are thought to make for fairer, more accurate verdicts. In this respect, they strengthen the law's capacity to resolve disputes legitimately, which in turn makes the law a more effective agent of social integration.

Globalisation poses special problems for the law as an instrument of integration. Not only do legal norms and cultures compete for authority on the world stage, but also no nation is committed to an integrated global system of government. Yet there is enough global interchange and there are enough situations where countries, organisations and even people must cooperate cross-nationally that some degree of social integration at the global level is necessary for everyone's well-being. If the legal sphere is, from a functional standpoint, the lead institution in promoting social integration at the national and subnational levels, can it play a similar role in global society? Or to put the point more strongly, can we build a globalised society without legal institutions that promote its integration? The Parsonian theory I have built this discussion on would say 'no'.

This problem is not an abstract one, but is faced every day in those spheres where globalisation is most advanced and where close ties across national borders add the most value. Perhaps the best example is multi-national commerce. Those engaged in multi-national commerce cannot escape entirely the legal regimes of those countries in which they do business, which means they cannot escape inconsistency in the laws by which they are regulated.²⁶ However, it seems safe to say that most organisations that do business internationally would prefer regulation under a single legal regime, one that employs similar regulatory and dispute resolution procedures no matter where disagreements arise. Without a world government in place, the functional imperative of integration has led the most active players in the world trade system to try to establish their own legal system. In some measure they have been able to do so through the establishment of a regime of international arbitration²⁷ that can yield judgments binding under different countries' domestic laws. Commercial forces have also influenced and taken advantage of international treaties, which sometimes establish their own special tribunals. Even when tribunals are not established, treaty law is often binding on and enforceable by court judgments within nations.

What is happening internationally replicates what happened domestically in England and on the Continent centuries ago. Merchants of various sorts as well as labour guilds established their own laws and courts to deal with disputes within their ranks. As national legal systems developed, much of the business of these courts was taken over by national court systems and the norms they enforced were incorporated into official law or replaced by it.²⁸ Whether something like this will happen on a global sphere is a question I have no way of answering. A related question is what procedures will best serve the function of societal integration at the global level. Arbitration procedure suggests that the procedures that emerge will be a blend of Continental and Anglo-American traditions. On the one hand, rules of evidence are relaxed in arbitration and there is no jury. On the other hand, arbitrators are passive judges and the parties are responsible for developing their cases. Reason giving, which is sometimes seen as the most important distinction between Anglo-American jury trials and Continental judge or mixed-court systems, is sometimes expected in

²⁶ Witness Microsoft's antitrust difficulties in the United States and the EU and the different resolutions it has had to accede to.

²⁷ See, e.g., Y Dezalay and B Garth, *Dealing in Virtue: International Commercial Arbitration & the Construction of a Transnational Order* (Chicago, University of Chicago Press, 1997).

²⁸ Merchants' courts have not entirely disappeared. See, eg, L Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765.

arbitration proceedings and sometimes forbidden. So if we look to arbitration for a clue as to the procedures that are functionally best suited to promoting social integration, supporters of both the Anglo-American and Continental systems can point to ways in which the procedures they espouse are superior. But it may be a mistake to look to arbitration, international or otherwise, for such a clue. At the core of Professor Damaška's book is a set of arguments that associates ways that legal systems handle cases with the structures and goals of types of governments. The legal forms that might best promote the integration of a mature globalised state are likely to depend on how that state is organised, which from today's vantage point is unknowable.

Professor Damaška's great book, *The Faces of Justice and State Authority*, opened its readers' eyes to how Anglo-American and Continental legal procedures articulate with the societies in which they are found, and it alerted readers to issues that arise in considering this articulation. I have tried to examine the connections of procedural law and society at a yet more abstract level. I have not written a great book, just a short chapter. It is highly speculative, and I do not know if it succeeds as a work of theory. But I do hope it succeeds in its primary purpose, as a tribute to Professor Mirjan Damaška.

