

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

2001

What's So Special About American Law?

William Ewald

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), [Ethics and Political Philosophy Commons](#), [Legal Commons](#), [Legal History Commons](#), and the [Legal Theory Commons](#)

Repository Citation

Ewald, William, "What's So Special About American Law?" (2001). *Faculty Scholarship at Penn Law*. 1249. https://scholarship.law.upenn.edu/faculty_scholarship/1249

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

OKLAHOMA CITY UNIVERSITY LAW REVIEW

VOLUME 26

FALL 2001

NUMBER 3

SPEECHES

WHAT'S SO SPECIAL ABOUT AMERICAN LAW?*

WILLIAM B. EWALD**

I.

Today I want to talk about the question, “What’s so special about American law?” And let me begin by saying something about why this is a question worth asking.

I have two reasons for being interested in this question. The first is a matter of practical pedagogy. Every year I teach an introductory course in American law to a class of foreign students, most of whom are already practicing attorneys back home. So they know what a court is and how to read a statute and how to draft a contract; but beyond those generalities there is surprisingly little we can take for granted. Obviously, if you are going to say anything worthwhile to people like that, you need some idea of what is *special* about American law, and what sets it apart from law back home—otherwise you will just end up telling them what they already know.

So I looked into the books published in Europe and designed to explain the American legal system to European lawyers. The standard texts all take a “legal families” approach. That is, they say the world divides into five or six legal families—for example, Islamic law, Hindu law, and, most

* This speech was given as the annual 2000-2001 Quinlan Lecture, March 29, 2001.

** Professor of Law and Philosophy, University of Pennsylvania.

inexorably, the Common Law Family and the Civil Law Family. The American system is then slotted into the Common Law Family, whose defining characteristic is said to be that it rests on a system of precedent, whereas the Civil Law Family rests on codified law. And the result of this way of thinking is, you get a lot of books with titles like “An Introduction to the Anglo-American Legal System.”

Now, at first glance there should be something strange about a phrase like “*the* Anglo-American legal system,” or with a scheme of taxonomy that lumps together the United States and Zimbabwe and Hong Kong in one basket, and France, Japan, and Brazil in another. In fact there are lots of things that confuse or outrage foreign students in an LL.M. program—but they are almost never bothered by the distinction between codified law and precedent.

This observation is already enough to prompt the question in my title. But there are other reasons for being interested in it as well. We hear every day about globalization, about how business is becoming increasingly international, about how the Europeans, in order to compete, are adopting a common currency and harmonizing their legal systems. It is normal to wonder how American law fits into this trend and how far this process of international harmonization is likely to go. Should we expect other legal systems to Americanize their law? Or should we expect to have to Europeanize our own legal system? Would either of these developments be a good thing? And how difficult would harmonization be to carry out in practice?—But clearly if you are to have any hope of answering important questions like these, you need first to have an answer to the question, What is distinctive about American law? What, if anything, sets it apart from law in the rest of the world? And then, lurking behind these practical questions are a bunch of questions of legal theory, such as, What is the relation between law and society? What is the role of history and economics, ideology and culture, the legal tradition and social norms in giving shape to a modern legal system, and in distinguishing one legal system from another?

Surprisingly little has been written on this topic by comparative lawyers; and in this lecture I’ll try to do two things: first, to persuade you that the standard answers to the question that one commonly hears are basically inadequate. (To say that they are *inadequate* is not of course to say that they are *wrong*—just that they don’t do as good a job as one would like). About this negative part of the argument I am fairly confident. But then I’ll also try to sketch a positive answer of my own: And here I am

much less confident that I have gotten things right. So my suggestions about how to answer the question, What is so special about the American legal system, are extremely tentative and provisional. But if I can persuade you that the question is worthwhile and that the answer is much more complicated than it seems at first glance, that is perhaps enough progress for an hour.

Before turning to the question itself, a few clarifications may be in order.

First, in looking for what is distinctive about American law, it will be helpful if we distinguish between *deep* differences and *superficial* differences. To say that a difference is superficial is not to say that it is not important; and superficial differences can even come as a surprise. For example, many American lawyers are surprised when they learn that contingent fees are illegal in most of the world outside the United States. This is clearly an important fact for a lawyer to know; but it is not a *deep* fact in the sense in which I am using the word. For the fact about contingent fees, by itself, has no profound conceptual or systematic implications about the legal system; and as soon as one is told this fact, one immediately can figure out the reasoning that underlies it.

Now, it might be that *all* the differences between, say, the American and the French legal system are superficial differences like the difference over contingent fees. In that case, comparing the two systems would be a bit like comparing two fairly similar automobiles, one made by Ford and the other by Buick. What you have is thousands of little differences in the individual parts—but no deep underlying difference of principle, unlike, for example, the difference between a car and a refrigerator. *If* that is the sort of way in which the French and the American legal systems are distinguished, then the best we can do is simply to list the thousands of little differences—which would be a boring intellectual exercise (though it might also suggest that the harmonization of the two systems at least would not have to overcome some deep underlining difference of principle).

But for this enterprise we are looking for *deep* differences—first, because that is the path of conceptual simplicity; and secondly, because the deep, unstated, and far-reaching assumptions are likeliest to cause confusion and to present an obstacle to harmonization.

A second preliminary point. In looking for the differences between legal systems, I do not mean to imply that there is necessarily some *unique* way of clarifying and grouping together various legal systems. For some purposes American law may be closer to Swedish law than either is to

Canadian law, and for other purposes not. (In fact, to give you an important example that I'll say something about later: It seems to me that American constitutional law is closer to German constitutional law than either is to British or French constitutional law.)

Third, it is important to distinguish my question about the American *legal* system from the wider debate about what is called "American exceptionalism." There is an extensive sociological literature on what makes America different, going back at least as far as Tocqueville. This literature considers such questions as: Why, in contrast to every European country, has there never been a powerful socialist movement in the United States? Why does American society have a much higher rate of violent crime than other Western societies? Why is the rate of religious observance higher? And the sociologists have pointed to a lot of other features of American life to explain these things—the absence in America of a feudal past, the ready availability of land on the Western frontier, democracy and individualism and ethical diversity, the Constitution, and the Protestant work ethic, for example.

Now, there is a complicated relationship between the sociologists' question, "What makes *America* different?" and my question, "What makes American *law* different?" Some aspects of American law—the Constitution, democracy, equality, and freedom of speech and religion—plainly stand in a complicated relationship to American *society*. It is of course a highly controversial question whether law shapes society, or society shapes law, or both, or neither. I wish here to set aside such worries as far as possible and just compare the American *legal* system to other *legal* systems—but recognizing that in the end the more complicated sociological questions will have to be addressed.

So let us now turn to the question, "What's so special about American law?"

II.

As I just explained, the most familiar answer to this question is that, at least to a first approximation, American law belongs to the common-law family of legal systems, while much of the rest of the world follows either the civil law or some other legal tradition. This way of dividing up the world into various legal "families" or legal traditions has a distinguished pedigree, and goes back at least as far as René David's path-breaking scholarship. It is the standard account in the literature, and some authors go

so far as to speak of the “Anglo-American Legal System” as a designation for the common law.

But once we have drawn the boundary line in this way, we now need to explain *exactly* what distinguishes the common law from the other legal traditions, and most especially from the civil law. And here the explanations fall into several classes.

The first and the most familiar explains the difference as follows. In the civil law countries law is based on a written *code*, laid down by the *legislature*, whereas in the common law it is based on *precedents*, handed down by *judges*. Now, I do not deny that there is some truth to this observation; but I *do* deny that it is an adequate answer to our main question.

In the first place, much of American law *is* codified either by statutes or by administrative regulations. The contrast applies with full strength only to the private law of tort, contract, and property—important areas to be sure, but not the whole of law. Second, even within those areas of private law, some common-law jurisdictions have reduced their contract law to a legislative code without in the process ceasing to be common-law jurisdictions: California offers the clearest example, but one can also think of those numerous jurisdictions that have enacted the Uniform Commercial Code. Third, the reliance of common-law judges on blackletter treatises and on Restatements is not *in practice* very different from the reliance of a continental judge on the Civil Code. The basic rules of contract and tort and property are well understood throughout the Western world, and have an authoritative written statement in both systems: The mere fact of legislative enactment makes little difference to the typical litigant. Fourth, codification is in fact a comparatively recent phenomenon in the civil law systems. The earliest code, the Napoleonic Code, is less than two hundred years old; and most of the countries of central Europe did not acquire a civil code until the start of the twentieth century. Basically, throughout the Western world one sees a common pattern of development. Chaotic and customary rules about land and promises and injuries were analyzed and reduced to order in the eighteenth and nineteenth centuries, and then were given a canonical formulation either in a civil code or in a treatise or in a Restatement.

For all these reasons, then, the mere presence or absence of a civil code is hardly the most striking difference between law in America and law in the rest of the world.

So let us turn to a second way of drawing the distinction between the civil law and the common law. According to this second theory, it is not the

civil code, but the use of judicial *precedents* that distinguishes the common law from the civil law. Once again, there is some truth to this theory; but once again, it is inadequate to answer our main question. The truth is that in a country like France, for example, judges are not legally bound by the doctrine of *stare decisis* in either its horizontal or its vertical form. That is, a court is only obligated to follow the *Code*. It is not obligated to follow its own precedents in an earlier case—the horizontal aspect of *stare decisis*. Even more surprisingly, a lower court is not obligated to follow the view of the law held by a superior court—even if the superior court has remanded a case back down to the lower court for decision.

But once again it is important not to exaggerate the difference in attitude toward precedent. In the first place, when a European court has announced its opinion on a particular matter of law, typically it will stick to the same opinion in later cases for all the obvious reasons. Secondly, lower courts will typically follow the opinions of higher courts, both to avoid the embarrassment and extra work caused by a reversal, and because in many jurisdictions their chances of promotion suffer if they are reversed too many times. For all these reasons, then, despite the official dogma, the behavior of civil law courts in the past is a reliable guide to how they will behave in the future. (And in fact, in some countries such as Germany some law professors in some law schools have begun to teach law using the case method.)

None of this is to deny that there is a difference in official dogma about the binding force of precedent, or to deny that the difference is important. But in practical terms this is not a difference that causes much confusion to foreigners when they come to study Law in the United States, and it does not mark a deep point of distinction setting apart the United States from the rest of the world.

And there is a subtler reason why precedent does not play this role. It is often said that the common law evolved historically in England as judge-made law, announced by the courts of the King. It is easy to slide from this truth into the assumption that the common law has *always* rested on precedent, and that the main task of common lawyers has *always* been to locate and cite previous judicial opinions. But in fact even in England there was no regular system for reporting opinions until nearly half a century after the American Revolution. Before that time, lawyers in England and in America relied on Blackstone; and before Blackstone the situation was even more chaotic. (Blackstone's views on precedent, by the way, are quite subtle. His view is not that the law is simply to be identified with the totality

of past judicial decisions. Rather, the law is something more abstract, implicit in the customs and immemorial practices of Englishmen; and the job of the courts is to *discover* what the law is. Past opinions are *evidence* of what the law is, but for Blackstone they are not the law itself.) In other words, the common law's reliance on judicial precedent is a relatively recent artifact: yet another reason for not treating precedent as the crucial point of division between America and the rest of the world.

Let me briefly sum up where we are. I am trying to answer the question, "What's so special about American Law?" As a first approximation, I am considering the standard answer: "America is different because it is a Common-Law system." But when we asked, "What's so special about the Common Law?," the first two answers we came up with—it does not have a *civil code*, and it relies on *precedents*—turned out not to be terribly distinctive after all.

So let us try a third approach. Some scholars have sought to explain the difference *historically* as follows.

In the high middle ages, around the end of the eleventh century, two events occurred that caused English and Continental Law to pursue divergent paths. The first event was the Norman conquest of England in 1066, followed by the consolidation of political power throughout the kingdom in the hands of a central monarchy. Law in England was administered in the courts of the King, and was pronounced by judges in his name: a degree of central control that existed nowhere else in Europe.

The second event was the recovery around 1100, in Italy, of the written text of classical Roman Law, the *Corpus Juris Civilis* of the Emperor Justinian. This text was recovered just when the political leaders of the middle ages were seeking to consolidate *their* power and to improve the authority and sophistication of their legal systems. The *Corpus Juris* gave them exactly what they needed: a highly sophisticated body of legal rules, far more carefully worked out than anything else available, and enjoying all the prestige and authority of the Roman Empire. The texts of the *Corpus Juris* were quickly copied to be studied in universities throughout Europe, and they became the object of learned scholarly research, for the next several centuries, at the hands of the Glossators and Post-Glossators and Commentators. It was *this* law—the law of ancient Rome, as interpreted by medieval scholars and taught in the universities—that provided the foundation for the civil law legal systems.

According to this story, the crucial difference between England and the Continent arises from these two events—the Norman conquest, on the one

hand, and the influence of Roman law on the other. On the Continent, law was developed by university professors; in England, it was developed by judges. And for this reason (the story goes), even today a judge in the common-law world is more highly regarded, is a figure of greater weight, than is a judge in the civil law; whereas for legal academics the ranking is reversed. And there are other differences that this account does a good job of describing. In the civil law, the development of law was a matter of interpreting an authoritative *text*, whereas in the common law it was a matter of deciding concrete *cases*. Where the common law represented “law in action,” the civil law represented “law in books.” The civil law was handed down in advance by the sovereign, while the common law had to be made up case-by-case. So the civil law developed from the top down, while the common law developed from the bottom up. And these differences in turn had other far-reaching consequences. The civil law, being laid out in advance, was more susceptible to careful logical analysis and to presentation as a coherent, abstract system, while the common law had a more chaotic structure, and looked more to the solution of concrete problems than to the construction of grand general principles.

These contrasts between the civil law and the common law are familiar, as are their further implications for the system of legal education and for the courts and for scholarship. And as an explanation for the differences between English law and Continental law, this historical explanation in terms of Roman law is far better and goes far more to the root of the matter than the explanation in terms of the civil code or in terms of precedent.

But still I do not believe that this explanation is good enough to answer our main question. I have three reasons. First, this explanation overstates the extent to which law in the middle ages on the Continent was directly inherited from Rome. Even if we leave aside the law merchant and feudal law and the law of the church (which included most of family law and contract law), what the medieval lawyer studied was not simply Roman law, but Roman law *as interpreted by the Scholastics*. The difference is crucial, for the entire abstract apparatus of Continental European law is a product of the medieval universities—and the relevant abstract categories and concepts were as influential in England as they were on the Continent. Secondly, the suggested explanation overlooks the way in which ideas about systematization and formalization of private law operated both in England and on the Continent, so that the codification movement was a pan-European movement, including such English figures as Bentham and Austin at the beginning of the nineteenth century, and Maitland and Pollock

at the end. Third, the Roman law explanation overstates the extent to which all modern legal systems have been influenced by the conditions of modern, industrial mass society. Contract law and tort law in their modern forms scarcely existed two hundred years ago; and the Napoleonic Code famously devotes only five short provisions to the law of torts. The industrial revolution and the increasing number of accidents changed all that, everywhere in the Western world, and in ways that are only loosely related to Roman law. So the Roman law explanation seems to me not to work either.

Let's try a fourth approach. So far we have been focusing on legal *rules*—the blackletter substance of the law, and how it is presented. Perhaps we should focus instead on *institutions*, and on how particular actors within the legal system perform their jobs—legislators and scholars, lawyers and judges, administrators and juries, for example. Perhaps *this* is where the dividing line between the common law and the civil law is to be found.

And with the mention of the jury we are certainly on to something important, because there *is no* jury in civil cases on the Continent (and even in criminal cases it functions differently than in the common law). But let us stick with civil cases. In contrast to codes or precedent or even Roman law, this is a *huge* difference, and it affects almost every aspect of the administration of civil justice. Without a jury you do not need formal rules of evidence, you do not need elaborate procedures of pretrial discovery, indeed, you do not need a *trial* at all in the usual sense, but rather what the Continentals call a *process*—a series of arguments before a judge that can stretch on for months or years. And without a jury to act as fact-finder, there is no reason why an appeals court cannot review questions of fact as well as questions of law.

There are immense differences, but focusing on the civil jury as the principal dividing line has some strange consequences. Remember that we were searching for a dividing line between the civil law and the common law. But in fact the jury in civil cases, although it is still central to *American* law, no longer exists in England (except in an insignificant range of cases). In other words, of the proposed differences between legal systems we have so far considered, the most significant turns out not to divide the common law from the civil law, but America from everybody else: The border is not where we expected it to be.

This is a significant fact, and it will be worth our while to step back and consider it. So far we have seen the inadequacy of various theories to account in a satisfying way for the differences between various modern

legal systems. And the root of all the inadequacies is the same. The distinction between the common law and the civil law systems, whether you try to explain it in terms of *codes* or *precedents* or the historical influence of the *Corpus Juris*, is always, in essence, a distinction between two bodies of *private law rules*. And it is easy to see how this particular distinction could have come to loom so large in the scholarly legal consciousness. When the subject of comparative law first emerged in the nineteenth century and the beginning of the twentieth, it did so when the codification movement was in full swing, and indeed the original purpose of comparative law was in large part to help legislators with the task of codification. In these circumstances it was natural for comparative lawyers to lay great emphasis on codes and the rules of private law, and thus to elevate the differences between England and the Continent into a difference between two “legal families”—the “common law” and the “civil law.”

I do not mean to deny that there are important distinctions here, both historical and theoretical. But as I said at the beginning, there may be more than one way of dividing up the legal world, and the traditional division of the world into common-law systems and civil-law systems may be for our purposes neither the most fruitful nor the most illuminating.

So let us now return to the civil jury. This *does* mark a very real distinction between American law on the one hand, and European law, including English law, on the other. But we cannot let the analysis stop here. For the continued existence of the civil jury in America, although it is an *important* difference, is in a certain sense not a *deep* difference of the sort I am searching for. So far all we have said is that America has the civil jury, and everybody else doesn't. But surely the question we need to answer goes much deeper than this. *Why* have the Americans kept the civil jury, while the English have abandoned it?

We need to make a fresh start.

As I said a few moments ago, the standard explanations all focus on the civil codes, that is, on the *substantive* rules of *private* law. It is significant that the one point of divergence we *have* found—the jury—belongs in essence to the *procedural* law, and thus is generically close to *public* law. Moreover, the jury is not a body of *rules* at all, but an *institution*, and this suggests that we might look at the functioning of other institutions, such as legislatures and judges, law firms and scholars, for clues to the distinctive features of American law.

Plainly there are a lot of threads to disentangle here. Since time is short, let me focus on the strand of public law.

Certainly one distinctive feature of the American legal system is its reliance on a written constitution. This is an important fact, but it is one that needs to be treated with some care. In the first place, most legal systems in the developed world today rely on a written constitution. What is immediately different about the American Constitution is its age—a fact which raises the question, Why was the American Constitution the first? Were there any distinctive features of law in America that led the Founders to adopt a written constitution? And whatever those features were, they must have diverged from the mother country, because Great Britain today is the only European nation without a written constitution. (In other words, what matters here is not the *existence* of a written constitution, but the *role* it plays within the overall system of American law. Is there anything distinctive, then, about the way we *use* our Constitution?)

Here an obvious answer suggests itself. The American legal system makes heavy use of judicial review. This is certainly an important fact, and sets the United States apart from countries such as Britain and France. In both of those countries (although this is changing under the impact of the European Union) the Parliament is supreme, and the courts have no authority to declare an act of the legislature unconstitutional.

But this theory is unsatisfactory as well, for two reasons. First, although it distinguishes the United States from Britain and from France, it does not work nearly so well for the rest of Europe. In particular, the German Constitution sets up a special constitutional court whose sole purpose is to decide questions of constitutionality, and which has broad powers to strike down acts of the Legislature. The constitutional experience of other countries (such as Italy and Austria) has been similar. Secondly, and more subtly, there is a problem of historical timing with this explanation. Remember what it is that we are trying to explain. We want to explain why the Americans were the first to adopt a written constitution (even though Britain did not); and we want to explain what features of American constitutionalism set it apart. But however powerful a force judicial review has been in the twentieth century, it was used only sparingly prior to the Civil War, and it is of course not mentioned at all in the Constitution itself. I am assuming that American law in 1830 was already quite different from European law; but if this is so, judicial review did not cause the divergence. In other words, important though judicial review undoubtedly is, it is itself one of the phenomena that we need to explain.

Let us pause to see where we are. I have been looking for an answer to the question, “What is so special about American law?” The standard

approach in the treatises of comparative law—the “legal families” approach—says that the world is to be divided up into the civil-law family and the common-law family, and that American law is a species of common law. But when we looked at this answer more closely we found that it broke down in two ways. First, even when we confined our attention to codes and precedents and the mechanics of private law adjudication, we found that the differences between the two families were less deep or surprising than is commonly supposed: Whatever may distinguish American law from the rest of the world, it is not the fact that American judges generally follow precedent cases. Secondly, as soon as we looked away from private law we found several far more significant differences between the leading legal systems of the Western world—for instance, the civil jury, written constitutions, and judicial review. And this list could easily be extended. But more importantly, once we descend to this level of detail, the differences between the principal systems do not seem to correlate in any interesting way to the distinction between the civil law and the common law. The dividing lines not only do not match up, but cut across each other in every possible way. This is an important point, so let’s consider some examples. On some issues, such as federalism or gun control or the death penalty, the United States is on one side and all the European legal systems on the other. On judicial review, Germany and the United States are on one side, Britain and France on the other. Britain has a monarchy, an established Church, and a House of Lords; France, Germany, and America do not. Germany has a constitutional guarantee of a social welfare state; France, Britain, and America do not.

This list could easily be continued, but it is already long enough to let us draw an important negative conclusion. The standard taxonomy that divides the world into common-law systems and civil-law systems, however natural it may have seemed to comparative lawyers at the end of the nineteenth century, is no longer a useful tool of analysis. It obscures rather than illuminates what is truly distinctive about various legal systems, and it is an obstacle rather than a help in answering our principal question.

This is so far only a negative result, though an extremely important one. There are a good number of books purporting to introduce foreign law students to “the Anglo-American legal system”; but if my argument is correct, there does not exist any such system any more than there exists an Anglo-Italian system or a Franco-American one.

III.

This negative conclusion leaves us with a puzzle about how to proceed. We still have to face the question, “What is so special about American law?” What deep aspects of the American legal system are most likely to cause confusion to a foreigner, and how are they best to be explained?

This question requires a *positive* answer, and it looks as though there are two ways we might proceed. The first would be simply to throw up our hands and acquiesce in the conclusion that there are a great number of variables that separate one legal system from another and that these variables are independent of one another. So we would explain the American legal system essentially by pointing to a *list* of these variables—judicial review, civil juries, federalism, the death penalty, contingent fees, separation of church and state, the Electoral College, and so on—but not try to find any sort of hidden unity behind this list. And it may in fact be true that there *is no* such hidden unity to be found—that there are no “deep” differences between legal systems, but only an accumulation of *surface* differences, and that looking for a deep, underlying distinction between the machinery of American law and French law is, as I said earlier, like looking for a deep, underlying difference between a Ford and a Buick.

Now this conclusion, if it is correct, would have important implications for legal theory and for questions about the evolution of law, the nature of legal transplants, the relative weight to be given to legal *ideas* as opposed to legal *rules*, and the prospects for harmonizing two distinct legal systems; and it may be that, in fact, this is the best we can do. These are complicated questions and I have no time to pursue them here, or to explain why, as a matter of legal theory, this pessimistic conclusion seems to me unlikely to be true.

Let me instead pursue the second course, which is to continue the search for deep differences between legal systems, independent of the old distinction between civil law and common law.

It will be a good idea to start by getting a firmer grasp on the question to be answered. I said earlier that in fact foreign law students are rarely puzzled by the American system of case law. So what *does* puzzle them? It is not hard to make a list: Here are some examples.

The civil jury I have already mentioned—and the fact that it leads to a complex and unfamiliar set of rules about pretrial discovery as well as to a set of rules of evidence law and to complex interactions between judge and

jury. The entire system of federal courts, and the interactions between the state and federal judicial systems, are almost uniquely an American phenomenon: The only real parallel (and it is not very close) is the interaction between the European Court of Justice and the legal systems of the European member states. The death penalty is found nowhere in Europe. Nor is the American system of plea bargaining. Nor are contingent fees for lawyers. If we turn to legal scholarship, intellectual movements such as law and economics or critical race theory have no real counterparts. Perhaps most startling of all is the American practice of electing judges and prosecutors, and of allowing them to run what is in effect a political campaign, complete with campaign contributions and the support of a political party.

It is phenomena like these, and not the mere citation of cases as precedents, that cause the most surprise to foreign lawyers studying the American legal system for the first time. It can be downright embarrassing to try to explain to them a case like *BMW v. Gore*,¹ in which an Alabama jury gave eight million dollars in punitive damages because BMW had repaired a scratch on his new car. In no other legal system in the civilized world can an unsupervised jury impose what is in effect a criminal penalty without any of the normal protections of criminal procedure, from the requirement of proof beyond a reasonable doubt to the prohibition against arbitrary or excessive criminal sanctions that have not been clearly specified in advance. And then try to explain that the judge faced re-election by the voters of Alabama, and that a large slice of the eight million dollars went to the lawyers, who were working on a contingent fee! In most of the rest of the world these facts would be viewed as incompatible with the rule of law and would be strictly illegal. And the situation is even worse when you try to explain how a criminal defendant facing the death penalty could be tried by an unsupervised jury, a prosecutor who is running for public office, a judge who is up for re-election, and a bored and underpaid public defender.

My goal is not to condemn these features of the American legal system, or to defend them, but to understand why they exist in America and virtually nowhere else. Is there some common thread that unites them, some common explanation for their existence?

I think there is, and it goes something like this.

1. 517 U.S. 559 (1996).

When you listen to an American and a European lawyer talk about a case like *BMW* it is striking how often the argument will end up sounding like this. On the one hand, the American would say that, yes, the jury award in that case was excessive. But Americans trust juries and the good sense of the people, and the occasional *BMW* case is a small price to pay for a democratic society that allows the direct participation of the people in the legal process. And similarly for the election of judges and prosecutors. These, just like a governor or a senator, are exercising a political power in the name of the people, and so it is important that they, too, be held democratically accountable at regular elections. On the other hand, the European is likely to say that yes, it is indeed important to keep the power of the state under control, but that the American system does so in an unprofessional manner and runs the risk of turning a trial away from the impartial administration of justice and into a species of mob rule.

With this debate I think we are close to an extensively fundamental distinction between the European and the American ways of thinking about their legal systems. It is important to notice that the terms and categories employed by both sides are subtly different. The American appeal is to the people, to direct democracy, and to electoral accountability: Notions like *the state* and *professionalization* play a distinctly secondary role, though they are primary for the European.

As I said, this fact seems to me a deep and fundamental point of difference. The American legal system, to a greater extent than any other Western legal system, encourages the direct injection of democratic values into the legal process. Our legal system, like our society, places great emphasis on the value of equality. We do not fully trust professional elites. In France and Germany judges receive special professional training and are promoted up through the ranks of a bureaucratic hierarchy where they are comparatively insulated from party politics. In America, judges receive no special judicial training and are often deeply involved in party politics. The American system values equality. We distrust hierarchies, we distrust big government, and for the same reasons we distrust elites. In contrast to any European country we place a greater faith in individual rights and freedoms, and in a deregulated market economy. These are deep tendencies in American legal thought, and it seems to me that they underlie the various phenomena I mentioned earlier that so surprise foreign lawyers: the populism of our jury system; the political involvement of judges and prosecutors and public defenders; the phenomena of ambulance chasers and contingent fees and the relatively unprofessional nature of the American

law; the attractiveness of free-market theories of law and economics; the openly political nature of judicial review and of our process of appointing justices to the Supreme Court; even such phenomena as the popularity of the death penalty or of critical race theory or of plea bargaining—all of these things are best seen in light of the deeply political nature of the American legal system, its commitment to egalitarian and democratic values, and its broadly based populism. To repeat the main claim of my talk: It is these phenomena that constitute the deepest and most distinctive features of the American legal system and that make it so special, and it is these phenomena we need to explain, and not the relatively trivial fact that American judges sometimes rely on precedents when foreign judges rely on a civil code.

But to say this is not yet to solve the problem, only to identify it. How are we to account for these differences? How did they arise, and how are they to be justified?

It might be thought that some deep characteristics of American society are in play here, and that the sociological literature on American exceptionalism might provide us with an answer. But I fear this avenue will not carry us very far. The sociological literature on this matter seems to divide into two types. One type points to the social or economic structure, and observes that American legal institutions grew up against the backdrop of a wide-open frontier, or that America never had feudalism or a hereditary aristocracy. But countries like Australia or Canada or Russia have had frontiers; and institutions like feudalism or aristocracy are themselves *legal* institutions of precisely the sort we need to explain. The other type of sociological account is more ideological and consists in pointing out that the “American creed” is committed to equality, democracy, populism, free-market economics, liberty, and pluralism. But if you then ask the sociologists why Americans are committed to these things, their answers typically point to the Constitution or some other feature of the legal system. So we just end up traveling in a circle, and indeed are likely to end with the suspicion that the exceptional features of American *society* are to be explained in terms of the exceptional features of American *law* rather than *vice versa*.

So where does that leave us? If my argument so far has been right, we can draw two conclusions: first, that there *are* a large number of significant differences between American law and law everywhere else, and second, that those differences seem to cluster around certain *ideological* aspects of the American legal system.

As I said at the beginning, I am not exactly sure how the analysis goes from here. But let me close by giving you a quick sketch of the beginnings of an account of where the principal differences come from.

Very roughly, it is important to remember that the modern European states are all, in one way or another, the heirs of the monarchies of the late middle ages. The kings and queens of early modern Europe had consolidated power in the hands of a unitary system of administrators and judges, all answering directly to the monarch. In the days of Louis XIV and the early Stuarts, of Bodin and Hobbes and Filmer, the legal thinkers of the time analyzed the legal system in terms of *sovereignty* and its close relative, the *state*. Every state, on this classical account, contains a single, absolute sovereign, who is the source of all law, whom all his subjects obey, but who himself is not bound by the laws he hands down. The roots of this conception go well back into the middle ages and all the way to Roman law. But for our purposes the important point to remember is that, at the time of the French and American Revolutions, when the modern Western legal systems were being created, the central organizing concept of European legal thought was the idea of the *state*, the inheritor of the powers of the old monarchies. When the kings were abolished or their powers limited, the state was still the central and most conspicuous aspect of political life. It was *there*, in all its power: And the central question of European political theory was, how do we control it? How do we limit its awesome power?

And the answer they gave went something like this. In the modern state, it is essential to separate the powers of the legislature from the powers of the executive. The legislature is the representative of the will of the People; but it is constrained to pass *general* laws of *prospective* application that will be applied by an independent bureaucracy to the entire population, including the legislators themselves. The executive bureaucracy is to take these general rules and see that they are impartially and mechanically applied. To guarantee against corruption, the bureaucracy must be independent of improper political influences. That is, it must be a professional, specially trained civil service, with security of tenure, whose loyalty is not to the *government*, but to something quite different: the *state*. This conception of an independent, professional, state bureaucracy is of course an elitist conception. The civil service, on this view, needs to be isolated from the forces of populist politics and needs to be specially educated to perform its tasks. And it is not hard to see the parallels between this ideal of a state bureaucracy and the European ideal of a judge. The judge, too, is to be an impartial administrator of justice, professionally

trained, and owing loyalty to the state rather than to the government. The task of the judge is impartially and mechanically to apply the general rules laid down by the legislature in its statutes and in the *Civil code*: It is to be a kind of highly sophisticated and professional technician, but *not* an independent force for political change.

But in America the development was very different. We, too, in 1787, faced the central problem of limiting and controlling the exercise of political power. But our theoretical framework was not at all the same. The British monarchy had never had as firm a grip on the American colonies as it had in England itself. And at the time of the Constitutional Convention there simply did not exist in America anything like a European state. Instead we had thirteen separate states—and it is a striking fact that even today the American legal system does not employ the concept of *the state* as an analytical legal category at all: We talk instead of the *government*. And the American solution to the problem of political power was different too. We do not rely on an elite bureaucracy or professionalization to control a centralized state. Instead, we break up power both horizontally (with the separation of powers) and vertically (between the federal and the state governments). And we rely throughout on a grass-roots conception of popular sovereignty, on the direct, democratic participation of the people, entrusting them with wide discretion to elect judges or sit on civil juries, just as they participate actively in the political process.

(It is for this reason, I think, that Europeans react so strongly to a case like *BMW*. They view it as an almost incomprehensible delegation of state power to the free discretion of unprofessional lay jurors. For them, this looks like a subversion of one of the basic principles of the rule of law—a surrender of the awesome power of the state to a kind of populist mob justice. But if one were to propose to an American lawyer the abolition of civil juries, and the consolidation of judicial power in the hands of a professional class of mandarins insulated from democratic political accountability, you would run up against a very different tradition of legal thought.)

It seems to me that the deepest differences between the American and the European legal systems are all linked, in one way or another, to these two different ways of thinking about the state and popular democracy. The American system of federalism, our continued use of the civil jury, the election of judges, the discretion to award punitive damages, the distrust of professional elites, are all, I think, heavily influenced by this deep, underlying difference.

As I said at the beginning, I am not sure about how the details of this argument are to be worked out from here. All I have tried to do in this talk is address the question, "What is so special about American law?" And I have made two claims.

First, that the standard answers given in the standard textbooks of comparative law do not work. Whatever is most distinctive about American law is not a matter of civil codes or judicial precedents or the rules of Roman private law. *Second*, that there *are* some surprising and distinctive features of the American legal system that set it apart in interesting ways from other Western legal systems, and that these features appear to be linked, in complex and subtle ways, to certain deep traits in the way Americans and Europeans think about the control of state power, and that those styles of thought go back to what an earlier Quinlan lecturer, Bernard Bailyn, significantly called the *ideological* origins of the American Revolution. I have not tried here to explore all the details, which is a task that would take us deeply into legal theory and into American and European legal history. But I hope at least to have persuaded you of the importance of the question, "*What is so special about the American legal system?*" and of how much more difficult this question is to answer than seems at first glance.