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ADDRESS

1992: HIGH TIME FOR AMERICAN LAWYERS TO LEARN FROM EUROPE, OR ROSCOE POUND'S 1906 ADDRESS REVISITED

*James R. Maxeiner **

INTRODUCTION

The collapse of Communism in Eastern Europe and the Soviet Union has created conditions conducive to a new study of foreign law. The countries of the former East Bloc are transforming state-planned economies into free market economies that will eventually join international markets. Suddenly, Eastern Europeans have very real needs to study foreign law. They require a host of modern laws to facilitate free markets, and they need to understand the legal systems of their Western trading partners. The American Bar Association (the "ABA") is establishing a Central and Eastern European Law Institute to promote this new study of foreign law and has initiated other programs to help Eastern Europeans learn about U.S. law.¹

The collapse of Communism is not the only occasion for the study of U.S. law as foreign law. Most American lawyers are not fully aware of the extent to which U.S. legal ideas have been received abroad. In Germany, for example, U.S. law has had profound effects on many fields of law. U.S. experiences have heavily influenced German constitutional law, particularly in the areas of federalism and the scope and review of constitutional rights. The German Constitutional Court was in some ways modeled after the U.S. Supreme Court.² The United States itself imposed an antitrust law on Germany during the

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1. Talbot "Sandy" D'Alemberte, *The ABA in Central and Eastern Europe*, A.B.A. J., Nov. 1991, at 10; *Exporting Democracy: U.S. Lawyers Help Eastern Europe Draft New Constitutions*, A.B.A. J., June 1990, at 18-19.

2. See ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW*

post-war occupation—the first antitrust law in Europe. Germany did not reject the legal transplant, but reformulated it, and introduced its own law in 1958.³ Since then, Germans and others in the European Community (the “EC”) have studied U.S. antitrust law as an aid in developing their own laws. Germany introduced merger control laws in 1973 to complete its antitrust laws, and the EC followed in 1990. Ironically, in this, the 100th year of American antitrust law, antitrust laws may be better accepted in Europe than in their original home. In numerous other areas, such as product liability, environmental law, franchising, and leasing, U.S. law has influenced the development of law in Germany and in the EC.

Indeed, in Germany there is scarcely a field of law that has developed without at least some attention to developments in the United States. Rolf Stürner, professor of law at the University of Konstanz, recently reviewed the reception of U.S. law in Germany and suggested that U.S. law schools have become the “Bologna of the present.”⁴ Stürner noted that in the Middle Ages aspiring German jurists journeyed to Italy to begin careers; today they travel to the New World to study at a U.S. law school or to apprentice at one of the giant U.S. law firms.

I. *COMMERCIAL CONSIDERATIONS COMPEL FOREIGN LAW STUDY*

In reviewing the reception of U.S. law in Germany, Stürner observed that there has been no comparable reception of European law in the United States. The prerequisite study of foreign law has not occurred. It is the rare American who has studied law in continental Europe. U.S. law schools pay foreign law little note. Present day proposals to deal with severe U.S. legal problems hardly ever give serious attention to foreign experiences. For example, under the heading of alternative dispute resolution, U.S. lawyers consider everything

SYSTEM 137-41 (2d ed. 1977) (discussing German constitutional court and judicial review).

3. See ADOLF BAUMBACH & WOLFGANG HEFERMEHL, *WETTBEWERBS-UND WARENZEICHENRECHT* 1210-13 (8th ed. 1960).

4. Rolf Stürner, *Die Rezeption U.S.-amerikanischen Rechts in der Bundesrepublik Deutschland*, in *FESTSCHRIFT FÜR KURT REBMANN* 839 (Heinz Eyrich et al. eds., 1989). Much the same has been said for Switzerland. Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 *AM. J. COMP. L.* 229, 230-35 (1991).

from mini-trials to mediation to coin-flipping, but rarely look at dispute resolution mechanisms used in Paris or Berlin. More perplexing still is the antagonism likely to greet the rare serious call for such study.⁵

The momentous events in Eastern and Western Europe may lead to a lessening of American ignorance of European law. The unification of the internal market in 1992 and the collapse of Communism will require that the United States take increased note of foreign law. The requirements of international trade will permit no other choice if the United States is to be competitive. With the completion of the single European market on December 31, 1992, the EC will become the single largest free trading bloc in the world. The position of the United States as the world's industrial and military leader, which it enjoyed in the years immediately following the end of the Second World War, will have come to an end. The ability of the United States to dictate to European allies will be gone for good. Americans will have no choice but to negotiate with Europeans as equals. The day when Americans could routinely impose their views and enjoy the application of U.S. law in commercial relations, without resistance, will be only a memory. Yet the need of the United States for international commerce will not diminish; it will grow. As U.S. military might becomes less relevant in a more cooperative and less antagonistic world order, U.S. economic competitiveness becomes vitally important.

If economic developments induce Americans to study foreign law more so that they are better able to *deal* with foreign legal systems, Americans should nonetheless use this opportunity to *learn* more from foreign law. Recent events are likely to make such learning more attractive. European integration is likely to increase the intellectual appeal of the study of foreign law in the United States. Europe's "civil law" may undergo a

5. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985), criticized in Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988); Herbert L. Bernstein, *Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems*, 21 U.C. DAVIS L. REV. 587 (1988); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990).

renaissance as Europeans harmonize and unify their laws. U.S. lawyers less frequently will encounter different laws in different countries, and more often find a harmonized or even unified European law.⁶ Moreover, thanks to the United Kingdom's membership in the EC, that law will now be in English, and thus accessible to all U.S. lawyers.

Socialist law, once considered to be "different" from its civil law roots, will now surely return to those roots.⁷ The former Eastern Bloc countries will not receive the common law. Their desire for association with the EC will impel them toward harmonization with the civil law even if they had no such background.⁸ The real question may be what, if anything, of "socialist law" will survive?

European integration is also likely to divert European attention from the U.S. legal system. Europeans are likely to focus on harmonizing their own systems, just as U.S. attention has long focused on comparisons of the laws of fifty-one separate legal systems. Europeans simply will have less time for understanding the U.S. system. Less attention may translate into less patience with the peculiarities of U.S. law. Europeans may challenge aspects of U.S. procedure and laws which they find distasteful. Such a challenge has already occurred. Under the General Agreement on Tariffs and Trade (the "GATT"),⁹ certain American legal procedures that block foreign imports of patented goods were found to discriminate against foreign producers. As a result, the United States must now

6. For Henry Sumner Maine, "one of the most singular phenomena" of his day, dating from the French Revolution, was the "gradual approach of Continental Europe to a uniformity of municipal law," which led him to conclude that "Roman Law," or civil law, was "fast becoming the *lingua franca* of universal jurisprudence." HENRY SUMNER MAINE, *Roman Law and Legal Education*, in *VILLAGE-COMMUNITIES IN THE EAST AND WEST* 330, 361 (1876).

7. Cf. John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781 (1989).

8. The recent State Treaty between East Germany and West Germany provides an explicit example. It provides: "The Law of the German Democratic Republic is to be formed according to the principles of a free, democratic, social order governed by the rule-of-law and is to orient itself on the legal system of the European Community." *Gemeinsames Protokoll über Leitsätze*, in *BULLETIN* [der Presse—und Informationsamt der Bundesregierung], May 18, 1990, at 526 (emphasis added).

9. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. (5) & (6), T.I.A.S. No. 1700, 55 U.N.T.S. 187.

change those procedures.¹⁰

II. FOREIGN LAW STUDY SUPPORTS LAW REFORM

While commercial dealings may provide the immediate impetus for the study of foreign law, learning for the purpose of law reform is a more cogent reason to study foreign law. The U.S. legal system suffers from serious deficiencies. According to former U.S. Supreme Court Chief Justice Warren Burger, “[o]ur system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”¹¹ The study of foreign law, and of the civil law in particular, offers an alternative system that is worthy of a truly civilized people.

Perhaps the most famous criticism of the U.S. legal system is Roscoe Pound’s August 1906 address in St. Paul, Minnesota, “The Causes of Popular Dissatisfaction with the Administration of Justice.”¹² Pound devoted a substantial portion of his critique to “causes lying in the peculiarities of our Anglo-American legal system.”¹³ Pound’s address was an invitation to the study of foreign law.

It should be a truism that any program of law reform begins with consideration of how foreign legal systems deal with similar problems. In the United States, however, it is not. Here is not the place to relate the story of comparative law in the United States, but suffice it to say that the coming of two world wars that began in Europe did not promote interest in European law as a source of solutions to U.S. legal problems.

Today there is no excuse not to learn from others. It would be arrogant in the extreme to hold out U.S. law as a model for legal reform in Central and Eastern Europe and to refuse to recognize that other legal systems have much to offer the United States. Indeed, the possible contributions of the study of foreign law to legal reform in the United States are numerous. As an indication of the scope of possibilities, this address identifies a few concrete examples of fruitful areas for

10. See 55 Fed. Reg. 3503 (1990).

11. Warren E. Burger, Annual Report on the State of the Judiciary, Address Before the American Bar Association (Feb. 13, 1984), *quoted in* 52 U.S.L.W. 2471 (Feb. 28, 1984).

12. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 35 F.R.D. 273 (1964).

13. *Id.* at 275.

study drawn from just one legal system—that of Germany. All of the areas provide solutions directly responsive to just one group of problems—those identified by Pound as peculiar to Anglo-American common law. Pound's problems and Germany's solutions are chosen purely for convenience.¹⁴ Study of these or other problems as handled in other legal systems could be equally fruitful.

Pound identified five causes for dissatisfaction with the administration of justice that he attributed to the peculiarities of the U.S. legal system.

- (1) *The individualist spirit of our common law, which agrees ill with a collectivist age.*

Pound began in his 1906 St. Paul address by referring to an article that he had recently published, in which he had explained in detail his view of the individualist spirit of the common law:

Men have changed their views as to the relative importance of the individual and of society; but the common law has not. . . . To-day, we look instead for liberty through society. . . . The common law, however, is concerned, not with social righteousness, but with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe.¹⁵

In the St. Paul address, Pound repeated his point that “[t]he chief concern of the common law is to secure and protect individual rights. ‘The public good,’ says Blackstone, ‘is in nothing more essentially interested than in the protection of every individual’s private rights.’”¹⁶ According to Pound, the U.S. common law system has relied mainly on individual initiative to ensure efficient government and the proper regulation of private economic behavior. Pound concluded that “[i]n consequence, the courts have been put in a false position of doing nothing and obstructing everything.”¹⁷

In the generation after Pound's address, the United States

14. Germany's is the Civil Law system that the author knows best.

15. Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 346 (1905).

16. Pound, *supra* note 12, 35 F.R.D. at 280.

17. *Id.* at 281.

saw the coming of the New Deal and the end of the common law's "obstructing everything." Today, instead of "doing nothing," many conservative critics would say that the common law does too much. However one judges the common law's effectiveness, the U.S. common law system still has much difficulty addressing questions of social import, which it continues to treat as private controversies.

Questions of social import appear more frequently institutionalized in the German legal system than in that of the United States. A principle of social justice is part of the German constitution—not as an independent source of rights but as an aid in applying the constitution generally.¹⁸ Social limits on individual rights are explicitly recognized in the constitution. For example, article 14 of the German constitution provides that "[p]roperty and the right of inheritance are guaranteed."¹⁹ The same provision, however, also provides that "[p]roperty imposes duties. Its use should also serve the public weal."²⁰ In stark contrast is Pound's quotation from Blackstone, which demonstrates the individualistic concern of the common law: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."²¹

The German concept of "social market economy" is a striking contemporary example of "liberty through society." The German social market economy looks to a free market, but imposes controls to prevent individuals from suffering under it and to protect matters of general public interest. Competition is protected in a social market economy, in part, to provide a limit on private economic power.²² The State Treaty between East and West Germany, which governed the currency union of July 1990, explicitly adopted the social market economy. Article 1, paragraph 3 states that "[t]he basis of the eco-

18. See Philip Kunig, *The Principle of Social Justice*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 187 (Ulrich Karpen ed., 1988). The German constitution is known as the Basic Law.

19. *Id.* at 233.

20. *Id.*

21. Pound, *supra* note 15, at 346 (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *139).

22. See JAMES MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTI-TRUST LAW, A COMPARATIVE STUDY* 7 (1986).

nomic union is the social market economy as the common economic system of both contracting parties.”²³ The few calls for a separate East German state as a more “social” alternative to unification went unheeded because the availability of the Federal Republic’s social market model made unnecessary a choice between socialism and unmitigated capitalism. Article 1, paragraph 4 of the State Treaty provides further that “[t]he social union forms together with the currency and economic unions a unity. In particular, it is defined by a labor law system complying with the social market economy and a comprehensive system of social security resting on principles of just reward for performance and social equalization.”²⁴

The social safety net of capitalist Germany is better constructed than that of the United States. Only today do Americans begin even to speak of comprehensive health insurance for all Americans. However, such insurance has long been the rule in Germany. Indeed, social security got its start over a century ago under Bismarck.²⁵ While in the United States the Chicago School advocates a single goal policy for antitrust, Germany clearly rejects such a limited policy.²⁶

Contemporary German administrative law provides a sophisticated system that seeks to balance the protection of individual rights with societal concerns. German administrative law offers many valuable ideas for the control and direction of those charged with determining general welfare.²⁷ Building on French models, the German system furnishes a thorough, comprehensive, and largely effective control of administrative discretion. Two decades ago, Kenneth Culp Davis, the dean of U.S. administrative law scholars, called attention to the advantages of the German system and encouraged Americans to

23. *Vertrag über die Schaffung einer Währungs-Wirtschafts-und Sozialunion*, in *BULLETIN* [der Presse—und Informationsamt der Bundesregierung], May 18, 1990, at 517.

24. *Id.* at 518.

25. See GERHARD A. RITTER, *DER SOZIALSTAAT: ENTSTEHUNG UND ENTWICKLUNG IM INTERNATIONALEN VERGLEICH* 60-86 (1989). See generally WILLIAM HARBUTT DAWSON, *SOCIAL INSURANCE IN GERMANY 1883-1911* (1912).

26. See MAXEINER, *supra* note 22, at 152 n.17.

27. These protections were further strengthened following the Nazi perversion of the social side of law. In Nazi jurisprudence, the following maxim prevailed: Everything useful to the people is right; everything that injures them is wrong. See generally INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 68-81 (Deborah Lucas Schneider trans., 1991) (discussing application of Nazi jurisprudential principles).

study it.²⁸ Not an American, but a common lawyer from India, has followed up on Davis's suggestion.²⁹

(2) *The common law doctrine of contentious procedure, which turns litigation into a game.*

The "sporting theory of justice" was a recurrent theme of Pound's.³⁰ According to Pound, it meant that "[t]he inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?"³¹ Despite numerous attempts at reform since Pound spoke these words—including the introduction of the Federal Rules of Civil Procedure—they remain as true as ever.

Among German executives, involvement in U.S. litigation is considered a "traumatic experience," if not "a nightmare."³² Stürner, who is generally favorable to the reception of U.S. law in Germany, notes that in civil procedure, U.S. law serves chiefly as a negative example or "antipode" for Germany.³³ John H. Langbein, professor of law at Yale Law School, has written eloquently on what he calls the "German Advantage in Civil Procedure." He finds the principal advantage to be that the German judge has charge of fact-finding.³⁴ This seems particularly relevant in the United States today, as virtually every meaningful proposal for reform of the American litigation system calls upon judges to be "managerial," and to take more responsibility for the cases they handle.³⁵

Langbein's judgment may be taken a step further. German judges decide cases because that is their task. They are naturally interested not in the rules of the game, but in *applying the law*, and in determining what substantive law and justice require. In these days of Critical Legal Studies and Legal Realism, to suggest that judges should apply the law to the facts

28. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 191-95 (1969). See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE IN EUROPE AND AMERICA* (1976).

29. See MAHENDRA P. SINGH, *GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE* (1985).

30. Pound, *supra* note 12, 35 F.R.D. at 291.

31. *Id.* at 282.

32. See James R. Maxeiner, Book Review, 23 INT'L LAW. 321, 323 (1989).

33. Stürner, *supra* note 4, at 850.

34. Langbein, *supra* note 5, at 848.

35. *Id.* at 858-62 (discussing methods of managerial judging).

may seem a quaint notion or, worse still, evil formalism. However, this conception is a fundamental tenet of German civil procedure and produces more efficient and just results than are usually available in the United States.³⁶

One example shows how managerial judging can be superior to U.S. procedures. Suppose a plaintiff in the United States brings a case involving four different claims. Each claim requires proof of four different factual elements. One element is common to all, and the parties dispute it ferociously. In a German case the judge will address the common issue first. Resolution of that issue, which may be simple and may require only hearing the views of a few witnesses, could obviate consideration of any of the other, possibly complicated issues. In the United States, the judge will not decide the one central issue because it is an issue of fact, and will instead send the parties off to engage in months, if not years of aimless, expensive discovery.

(3) *Political jealousy, due to the strain put upon our legal system by the doctrine of the supremacy of law.*

Pound complained that "the subjects which our constitutional polity commits to the courts are largely matters of economics, politics and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation."³⁷ At a time when U.S. courts run prisons and school systems, Pound's own example from 1905 hardly seems distant: "[We] have seen the collection of taxes from railroad companies, needed for the every-day conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great."³⁸

While not always successful, the German legal system attempts to separate legal questions from political ones. A legal question should be subject to resolution without having to

36. For general discussions of German civil procedure, see generally Benjamin Kaplan et al., *Phases of German Civil Procedure* (pts. 1 & 2), 71 *HARV. L. REV.* 1193, 1443 (1958); Arthur Taylor von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 *NOTRE DAME L. REV.* 609 (1988).

37. Pound, *supra* note 12, 35 *F.R.D.* at 282-83.

38. *Id.* at 283.

value public interest, because the valuing of public interest is a peculiarly political task. For example, generally in German antitrust law, questions relating to judgments of what is "competition" and what is an appropriate level of competition are decided by administrative authorities that are politically responsible, and not by the ordinary courts, which are not subject to political control.³⁹

The German Constitutional Court provides another example of how the German legal system attempts to remove politics from the everyday functioning of the judicial system. The Constitutional Court itself, of course, does decide political questions. Few German constitutional scholars would earnestly contend that the Court can simply and objectively apply the Constitution to a fact situation, even though this is the goal of German law generally. Nevertheless, the German legal system seeks to draw constitutional questions, such as the constitutionality of a tax law, to the Constitutional Court. The system functions in two ways. First, *only* the Constitutional Court has the power to declare a statute unconstitutional. When a constitutional law question arises in the course of litigation, if its resolution would require such a decision, the lower court must refer that question to the Constitutional Court.⁴⁰ Second, the existence of a "case or controversy" in the U.S. sense is not required for the German Constitutional Court to consider an issue. Instead, "abstract" challenges to constitutionality may be brought by one-third of the members of parliament, by the federal government, or by a state government.⁴¹ Challengers need not wait for the legislation to be applied to a particular case.

39. See generally MAXEINER, *supra* note 22. This situation, however, may be changing. See generally James R. Maxeiner, *Berlin Brief—West Germany Amends Its Antitrust Law*, N.Y. L.J., Apr. 3, 1990, at 1.

40. Basic Law, art. 100, § 1, translated in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 18, at 277.

41. *Id.* art. 93, § 1, cl. 2, translated in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 18, at 273; see Helmut Simon, *Verfassungsgerichtsbarkeit*, in 2 HANDBUCH DES VERFASSUNGSRECHTS 1253, 1265 (Ernst Benda et al. eds., 1984).

- (4) *The lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed.*

Here Pound was not referring to some highfalutin "legal theory," but to the very practical idea of law as science or system. Pound addressed the U.S. bar just six years after Germany's justly famous Civil Code went into effect. That very month, Frederic W. Maitland gave an address in praise of the making of the German Civil Code. Maitland called it "a great achievement" and a "just cause for national pride."⁴² To Maitland, Germany had set its "legal house in order," and had "striven to make [its] legal system rational, coherent, modern, [and] worthy of [the] country and our century."⁴³ The German Civil Code was neither the first nor the last example of an application of systematic, rational thinking to law that treated law as science. Long before Maitland, common lawyers familiar with the civil law admired it for its keen sense of system.⁴⁴

In another address to the American Bar Association in 1912, Pound stressed the civil law's sense of system and noted that

[i]f one doubts it, he has only to compare a modern institutional book on the Roman law, a modern elementary text-book of French law or a modern introduction to the German code with the conventional Anglo-American text-book of elementary law to see that we have no true system of the common law, much less a system of the law that actually governs.⁴⁵

For one schooled in both systems, it seems hard to emphasize this point too much.

While German students complain about the excesses of theory, and there certainly are some excesses, there is great value in systematic legislation and legal development. This value is not given sufficient credit in the United States, where

42. See FREDERIC WILLIAM MAITLAND, *The Making of the German Civil Code*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 474, 484 (H.A.L. Fisher ed., 1911).

43. *Id.* at 476.

44. See 1 ARTHUR BROWNE, *COMPENDIOUS VIEW OF THE CIVIL LAW* (1797). See generally MAINE, *supra* note 6.

45. Roscoe Pound, *Taught Law*, in REPORT OF THE THIRTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 975, 981 (1912).

there is instead excessive concern with individualization and extreme opposition to "formalism." Systematization fosters efficient, rational, and equitable application of the law. It contributes to making justice under the law equal. It also facilitates the development of comprehensive solutions to problems, rather than providing inadequate answers in piecemeal fashion.

Systematization does not necessarily mean codification. Indeed, codification seems harder and harder to achieve in Germany today. While there have recently been new German codes of administrative procedure, and of building and planning, as well as a substantial recodification of the criminal code, most observers would probably say that the day of codification has passed. What the future holds for the EC and its harmonized legislation is uncertain. But even if codification is gone and the standards of legislation are not what they once were, the fact remains that the general level of legislation is markedly higher in many European countries than in the United States. In Europe, there is a developing "science of legislation," which provides guidelines in drafting systematic legislation.⁴⁶ There, systemization is valued and produces positive results.

Systematization goes beyond codification of substantive law. It extends to the organization of law, including the determination of the applicable law and the competent decision maker. For example, the United States and Germany are both federal countries, but in Germany there is considerably less confusion about which law to apply and which decision maker is competent. In federal Germany, most important laws are federal laws, although state authorities carry them out. Thus, there is only one civil code and only one criminal code to apply. Each is federal, but in the first instance each is applied by authorities of the individual states. In each state, there is only one state court system that applies federal and state law. There is no separate federal court system. The federal courts are above the individual states' systems, and exist only to re-

46. For an annotated, selected bibliography through 1985, see von Eberhard Baden, *Auswahlbibliographie zur Gesetzgebungslehre*, in *GESETZGEBUNGSLEHRE: GRUNDLAGEN-ZUGÄNGE-ANWENDUNG 187-201* (W. Schreckenberger et al. eds., 1986). For developments since then, see the *ZEITSCHRIFT FÜR GESETZGEBUNG*, which has appeared since 1986.

solve questions of federal law. Were the United States to have such a system, a great amount of wasted effort would be avoided in determining which law applies or which court has jurisdiction.

(5) *Defects of form due to the circumstance that the bulk of our legal system is still case law.*

Pound spoke on case law in St. Paul, Minnesota, the home of West Publishing Company. In the 1880s West gave the case law system a new lease on life when it introduced the regular publication of opinions and a comprehensive and systematic digest system. The problem was then, as Pound observed, a subject of intense debate. John F. Dillon, a noted ABA president, complained that “[a]n almost unlimited number [of cases] can be found upon almost any subject.”⁴⁷ Some members of the Bar, however, recognized a better solution than West digests. In 1885, a committee of the ABA chaired by David Dudley Field reported:

We can imagine a primitive society, in which a king and his judges were the only magistrates. They had made no laws. The judges decided each controversy as it arose, and by degrees what had been once decided came to be followed, and so there grew up a system of precedents, by the aid of which succeeding cases were decided. Hence came judge-made law. But could any sane man suppose that this was a scheme of government to be kept up when legislatures came in?⁴⁸

Unfortunately, the Bar did not listen to Field’s report, and what appeared to be a flood of cases in 1885 is today but a drop in the bucket. But once again, the salvation is West Publishing Company—this time in the form of a computer search service.

This is another area where study of foreign law could be productive for U.S. lawyers. Unfortunately, in the many U.S. discussions of *stare decisis* and the supposed benefits of case

47. JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 243 (1895).

48. *Report of the Special Committee Appointed to Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can be Lessened, and if so, By What Means, in REPORT OF THE EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION* 323, 348 (1885).

law, scarcely a word is found about case law and statute law in civil law countries. In Europe, since the Second World War, there has been a very substantial literature discussing the role of case law in civil law systems, much of which focuses on both civil law and common law systems.⁴⁹ While case law in civil systems has yet to be formally recognized as generally binding, scarcely a jurist in Germany would not acknowledge that case law has achieved great importance.

CONCLUSION

Events in Europe are impelling Americans to give European civil law systems more attention. While commercial considerations are providing the catalyst, better U.S. law could be a by-product. Americans familiar with European systems will recognize, as Pound did, the extent to which the causes for dissatisfaction with the administration of justice in the United States lie in our peculiar legal system. With knowledge of civil law systems, we could work better for the future that Pound sought, one where our courts will be "swift and certain agents of justice" and the "sporting theory of justice" will be just a memory.

49. See, e.g., DIE BEDEUTUNG VON PRÄJUDIZIEN IM DEUTSCHEN UND FRANZÖSISCHEN RECHT (Uwe Blaurock ed., 1985); JOSEF ESSER, GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS (1956); WOLFGANG FIKENTSCHER, METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG (1975-77); O.A. GERMANN, DURCH DIE JUDIKATUR ERZEUGTE RECHTSNORMEN (1976); O.A. GERMANN, PROBLEME UND METHODEN DER RECHTSFINDUNG (1965); OSCAR ADOLF GERMANN, PRÄJUDIZIEN ALS RECHTSQUELLE (1960); Wolfgang Fikentscher, *Eine Theorie der Fallnorm als Grundlage von Kodex- und Fallrecht*, in 1980 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 161.