Culture and Disputing*

Oscar G. Chase†

The term "culture and disputing" as used here has three different meanings. First, it is the title of a seminar that some NYU colleagues and I have developed and taught over the last several years. Second, it is a theory of the relationship between a society and its disputing institutions. Third, it is a method for evaluating the advisability of effecting changes in disputing institutions. As all three are related, I will describe each in turn and discuss the way in which they have informed each other in my thinking.

I. THE SEMINAR

After many years of studying, teaching, and writing about the law of civil litigation in the United States, my curiosity caused me to investigate in ever more exotic places the question: How do others do it?, with the "it" meaning "deal with disputes." This took me first to the study of comparative law, the "others" here being modern states with advanced legal systems, the societies Felstiner calls "technologically complex rich societies,"[1] and then to anthropology, in which discipline the "others" becomes the peoples who organize themselves very differently—called by Felstiner the "Technologically Simple Poor Society."[2] My travels led me to embrace—in retrospect—an odd paradox: the further I moved from my original boundary, the more I learned about the place that I had left, and about its "civil procedure."

This may be only another way of stating the notion, repeated by more than one anthropologist, that the mental processes of one who enters a new and different world are first the overwhelming strangeness, then the strange becoming familiar, and, finally, the once-familiar becoming strange. The further I got from New York's courthouses, the stranger their methods looked to me. That strange light illuminates powerfully.

---

* Presented at the Colloquium of the International Association Procedural Law, Tulane University (October 28, 1998).

 Vice Dean and Professor of Law, New York University School of Law.

1. William Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC'Y REV. 63, 65 (1974).

2. *Id.*

This intellectual journey led me and my colleagues to develop the course we call "Culture and Disputing." Taught mostly to law students, the course uses readings from sociology, psychology, and, most of all, anthropology, to explore the dual questions: How does culture influence disputing; and how does disputing and its institutionalization influence culture? We ask the students to join us as we wander back and forth across boundaries.

There are many pleasures for both law students and faculty in a set of readings in which none of the cases can be found in the Supreme Court Reporter or its equivalents, and in which few of the rules can be found in written codes. One of the joys of this enterprise for me has been the exposure to the incredibly rich variety of disputing methods and institutions that have been produced by human cultures. I find some of these to be almost poetic in the sense that they express metaphorically and beautifully longings and passions that are central to the cultures that produce them. Sometimes they bring into sharp relief the psychic needs shared by all humans but expressed in muted, or at least different, ways in our own world.

Consider, for example, those peoples of the Western Pacific who have traditionally fought with food—i.e., by competitive village-to-village exchanges of food stuffs. A grievance suffered by one village at the hands of a neighbor may lead it to attack the offender by delivering to it a large amount of its locally raised produce. The rival is challenged to match the display in quality and quantity.[3] Failure is humiliating and vindicates the challenger. This strikes us at first encounter not only as amusing but quite puzzling: how can an enemy be hurt because I gave him more than he gave me? I believe the answer illuminates a quality of the gift in our own societies as well as in theirs. A gift creates an obligation of reciprocity in many societies. And to live with an obligation that cannot be met is painful (this explains, I think, why ceremonial gift giving in most families must involve gifts of the "right" value).

Some of the cultures we encounter usefully disabuse students of romanticized notions of primitive people living in an imagined Eden free of conflict or violence. Fred Myers describes the Pintupi, an aboriginal people of the Australian desert who live in small bands that (in the past) subsisted as hunter-gatherers.[4] Violence seems to have been a prominent feature of their lives and they have themselves

3. *See* SIMON ROBERTS, ORDER AND DISPUTE 61 (1979); *see also generally* MICHAEL W. YOUNG, FIGHTING WITH FOOD (1971).

4. *See* FRED R. MYERS, PINTUPI COUNTRY, PINTUPI SELF (1986).

described their life in the desert as "like army all the time."[5] For example, the Pintupi believe that any death or illness that has no obvious cause is a result of witchcraft directed against them by a different band, so such misfortune prompts a revenge expedition against some distant and unsuspecting group.[6] Can this unfortunate behavior be related to anything in technologically advanced societies? Surely it involves the familiar phenomenon of projection of evil onto the other. It also encapsulates the deep human longing to find an explainable and treatable cause for every ill, a phenomenon that may find expression (in our world) in some forms of product liability litigation. I argue that each society uses its own very different metaphysics to process the same emotion in a way that makes sense to them, if to no other group. Pintupi disputing illustrates that disputing serves psychic as well as physical needs and that it contains symbolic as well as rational aspects.

In our seminar we struggle with the different theories that try to make sense of the variety of institutions and beliefs we encounter. To what extent is the economic setting in which the peoples find themselves determinative? What role is played by metaphor and symbol? How does their view of the world connect to their ways of disputing? This takes me to the second way that I use the term "culture and disputing," for the seminar informs the theory.

II. THE THEORY

The theory may be simply stated because it consists of two core ideas. The first core idea is, that procedures are socially constructed. That is, procedural systems do not exist in nature—they are created by human beings and are culture-specific. The second, and less obvious idea, is that disputing procedures are one of the important institutions through which the on-going task of constructing of social life is accomplished.

Paraphrasing the American anthropologist Clifford Geertz, "Man is a creature suspended in a web that he himself has spun."[7] I take this to mean that humankind, born into a universe without meaning or social structure, must create both, and that each is a product of mental processes that include observation, calculation and imagination. The spun web is made of our social arrangements, our epistemology, and our psychology. Moreover, each informs the other. The web that

5. *Id.* at 159.
6. *See id.* at 167.
7. *See* CLIFFORD GEERTZ, LOCAL KNOWLEDGE 182 (1983).

holds us is partly composed of those institutions that make social life possible and partly of the internally held system of ideas that makes the universe tolerable. Because we are social animals, we neither are free to, nor do we have to, spin each web entirely anew. We are socialized into a web that at least in part has been spun for us and is communicated by parental instruction, education, the functioning of institutions, and by drama and ritual. It is clear to me that the procedures we use to resolve disputes are both strands of the web and are among the means by which we transmit its outlines to other members of our society.

To illustrate and illuminate this point, I describe in more detail a society that students invariably find foreign: the oracular justice of the Azande. The Azande, a people of Central Africa, were described in 1937 by the English anthropologist E. Evans-Pritchard as "unusually intelligent, sophisticated and progressive."[8] At the same time, Evans-Pritchard tells us, "we are amazed at the extensive part of [Azande] life which is given over to oracles and magic and other ritual performances."[9] Almost all human good fortune and misfortune is ascribed by the Azande to supernatural forces. Various oracles may be consulted to reveal the likely impact of particular life choices, such as a marriage, a journey, or the planting of a garden. Congruently, no important decision would be made by an Azande without consulting an oracle. Evans-Pritchard reported:

> The poison oracle, *benge*, is by far the most important of the Zande oracles. Zande rely completely on its decisions, which has the force of law when obtained on the orders of a prince . . . [W]henever a question arises about the facts of a case or a man's well-being they at once seek to know the opinion of the poison oracle on the matter.[10]

The process by which the oracle is consulted involves the administration of small doses of a poisonous plant extract to a small chicken in conjunction with putting a question to the oracle. The oracle gives the answer by killing or sparing the chick. In a legal proceeding, the oracle might be asked whether the accused committed the crime alleged, thusly: "If X has committed adultery poison oracle

---

8. E.E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES, AND MAGIC AMONG THE AZANDE (1937) [hereinafter EVANS-PRITCHARD, WITCHCRAFT]. I have previously reported on the procedures of the Azande in Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861 (1997), and use the same description in the present Article.

9. EVANS-PRITCHARD, WITCHCRAFT, *supra* note 8, at 19.

10. E.E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES, AND MAGIC AMONG THE AZANDE 121 (Abridged ed. 1976) [hereinafter EVANS-PRITCHARD, WITCHCRAFT II].

kill the fowl. If X is innocent let the fowl live."[11] A follow-up question is often used to confirm the original verdict. Although Evans-Pritchard did his field work in the 1920s, the use of the benge oracle continued at least until the eighties, as documented by a documentary video recording made in 1982.[12]

The Azande practice of chick sacrifice, which strikes many students as laughable when they first hear of it, presents (perhaps in part for that very reason), a teaching moment of great power and beauty. It illustrates in a way that one's own system cannot be the working of social construction (because it is so hard to observe objectively the very water in which we swim). My post-Enlightenment students always ask, "How can an intelligent and thoughtful people continue to believe in the validity of a system that is so likely to produce error? How do they deal with the inevitable palpably wrong judgments?"

The answer, of course, is that the benge trial is entirely logical when considered within the context of the Zande universe. In a world in which divination is seen as a path to knowledge of everyday kinds, and in which a supernatural belief system with explanatory and predictive power is essential to one's understanding of social and metaphysical existence, resorting to oracles to determine the truth of litigated facts seems entirely sensible. They handle "wrong" judgments much as an American might react to an improper jury verdict, or an Italian to a lapse by the Tribunale:

> No one believes that the oracle is nonsense, but every one thinks that for some particular reason in this particular case [such as interference by sorcery or a defect in the poison] the particular poison used is in error in respect to himself. Azande are only skeptical of particular oracles and not of oracles in general, and their skepticism is always expressed in a mystical idiom that vouches for the validity of the poison oracle as an institution.[13]

The Azande trial is a logical outgrowth of their overall belief system, that is, a social construct. But that is an incomplete picture, for it is also true that the Azande trial is in turn crucial to the construction of their belief system. Consider the effect on the community of the trial that I described. A trial has been aptly described as a "ritual of social

---

11. *See* EVANS-PRITCHARD, WITCHCRAFT II, *supra* note 10, at 139.

12. *See* videotape: Witchcraft Among the Azande (Granada Television International 1982) (Filmmakers Library).

13. EVANS-PRITCHARD, WITCHCRAFT, *supra* note 8, at 350.

transformation."[14] When properly performed the ritual transforms the relations between the parties (as from claimant to creditor or from accused to criminal), as well as the relations between the judge and the social group (from person to authority). As Freud observed, a ritual makes permissible behavior (such as inflicting punishment) that is otherwise forbidden.[15] Like all rituals, the Azande trial gains power with repetition and with acceptance of the resulting transformation. Each time the oracular pronouncement is announced, relied upon by social elites to legitimate the exercise of power, and assented to by those subject to them, the process is legitimated but so too *is the belief system that underlies it.* Far from a matter of metaphysics in the abstract, these beliefs take on a tangible reality that makes them all the more powerful. The circle from belief to process back into belief is thus complete.

The social effects of this disputing ritual is not only on the subjective perception of reality but are political as well. The functioning of the Azande king's oracle as the supreme fact-finder of last resort legitimated the authority of the king.[16] The subordinate position of women in Zande society was similarly enforced by oracular justice because of the public knowledge that women are excluded from participation in this ritual.[17] A threat to this form of dispute resolution may be seen as a threat to the psychological and social life of these people.

Far from being an irrelevant piece of exoticism, I think that by plainly revealing the place of dispute procedures in their social life, the Azande help us better understand our own cultural constructs. Like the Azande, we have devised procedures that are in part rituals that validate the social transformations that follow their application. And, like the procedures of the Azande, ours communicate something of what we believe about the universe and something about our social order.

---

14. Sally Falk Moore, *Selection for Failure in a Small Social Field: Ritual, Concord and Fraternal Strife Among the Chagga Kilimanjaro, 1968-1969*, *in* SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY 109, 111-12 (Barbara Myerhoff & Sally Falk Moore eds., 1975).

15. *See* Sigmund Freud, *Obsessive Acts and Religious Practices*, *in* SIGMUND FREUD, CHARACTER AND CULTURE 23-24 (Phillip Rieff ed., 1963) (1907).

16. The king's oracle functioned as a kind of "supreme court." *See* EVANS-PRITCHARD, WITCHCRAFT II, *supra* note 10, at 134; *see also id.* at 162 (describing that in legal disputes the authority of the oracle was the authority of the king).

17. *See id.* at 131 (explaining that this restriction "degrades women's position in Zande society").

III. THE METHOD

So I turn to the third and most difficult claim for culture and disputing: theory is a tool that helps us evaluate the desirability of new disputing methods, especially those to be transported from other societies. It does this by asking first, whether the proposed procedure "fits" the values and epistemology of the borrowing culture and, second, by assessing the probable impact of the use of this procedure on the broader culture of the society in which it is adopted. The proposition is not very controversial when limited to radically different societies—I take it that no one would think the benge oracle would be a useful addition to the Federal Rules of Civil Procedure. The poor fit would be absurdly obvious. What is more difficult, although in principle no different, is the application of the method to procedures borrowed from one modern society to another.

The difficulties are several. They concern the difficulty in defining cultural differences, the admitted mutability of societies over time, and the difficulty of separating the influence of professional elites over procedures from the influence of the broader society. Although we would, I hope, agree that there are cultural differences between, say, Germany and the United States, or between France and Italy, we might have difficulty in agreeing what they were, as it is difficult to isolate and prove differences in values and attitudes. But serious students of society have demonstrated, at least to my satisfaction, that such differences can be observed empirically.[18] Moreover, culturally specific attitudes and values can sometimes explain local attachments to preferred forms of institutional organization.[19] The connection between the details of procedural arrangements and the political organization of societies has been persuasively drawn by Mirjan Damaska in *The Faces of Justice And State Authority*.[20] There he illustrates (besides a great deal more) why a society comfortable with hierarchical arrangements is more likely to choose certain procedures for its courts than a polity that, as a culture, prefers more coordinate relationships.[21] Procedural institutions and rules can be seen as but one manifestation of the value preferences of the culture in which they are imbedded. This is one reason that rules

---

18. *See* GEERT HOFSTEDE, CULTURE'S CONSEQUENCES (Sage Publications 1980). *See also* authorities collected at Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, nn.41-42 (1997).

19. *See* HOFSTEDE, *supra* note 18, at 372.

20. MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986).

21. *See id.* at 16-70.

of procedure are transported from one culture to another with difficulty, if at all.[22]

While I would never claim that cultures are entirely static or that new procedures cannot be borrowed from one to another, even sometimes successfully, there is overwhelming evidence that cultural values and procedural arrangements tend to persist over time. Still, I must admit that there is a tautological aspect to the claim that procedures should not be borrowed because they cannot be borrowed. My method is not so crude; it only predicts difficulty in borrowing from cultures which differ in important values and attitudes. This method also alerts us to the dangers of even successful borrowing by reminding us that a price will be paid in more common currency: the procedures we adopt will affect the culture as surely as they are affected by it.

Let me apply the method to a concrete example, the peculiar (as compared to most of the rest of the world) American approach to the use of expert testimony in the judicial process. As John Langbein has put it:

> The European jurist who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. In the Continental tradition experts are selected and commissioned by the court, although with great attention to safeguarding party interests.[23]

The normal role of an expert in American courts is as a witness for one of the parties. Dueling experts offer conflicting opinions and it is the job of the judge or jury to decide which version of reality is more persuasive. To be sure, the neutral expert approach is available: Rule 401 of the Federal Rules of Evidence allows the court to appoint a neutral expert beholden to the court alone. However, this device is very rarely invoked.[24] Party appointed experts dominate the American

---

22. The difficulties, as well as some of the progress in, transporting procedures within the European Union countries is described in Konstantinos D. Kerameus, *Political Integration and Procedural Convergence in the European Union*, 45 AM. J. COMP. L. 919 (1997). See also, arguing against the homogenization of national codes in general because of the deep national cultural differences they reflect, Pierre Legrand, *Against a European Civil Code*, 1997 MODERN L. REV. 44.

23. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985).

24. *See, e.g.*, *id*. at 841; John C. Reitz, *Why We Probably Cannot Adopt the German Civil Procedure*, 75 IOWA L. REV. 987, 992 n.2 (1992).

courtroom when technical issues outside the knowledge of ordinary people are in dispute.

This system has been compared unfavorably to that prevailing in many civil law countries in which a neutral expert is selected and relied upon by the judge.[25] Undoubtedly problems exist with the American system. Not the least of which is the incentive for experts to tailor testimony to please the hand that feeds them. But for the moment let us avoid an instrumental view of the matter and note the cultural aspects. I think that poor reception of the neutral expert in the United States is in part due to what Damaska has called the American preference for coordinate, as opposed to hierarchical procedural arrangements.[26] I would go even further and argue that the public display of dueling experts in opposition to the annointment of a single authority signifies both discomfort with political hierarchy and—even more important—a cultural preference for a pluralism that extends even to our notion of the nature of reality. A society that requires court experts to submit their divergent opinions to the ultimate judgment of a lay person (whether judge or jury) is endorsing the idea that truth is elusive. Reality, in this performance, is not fixed or ascertainable. It is contingent; the subject of debate. The public spectacle of experts who disagree is not, in this sense, an embarrassing weakness, but an expression, here in a metaphorical way, of the familiar American suspicion of authority and of orthodoxy. Given the multi-cultural heterogeneity of American society, it is not surprising and may well be necessary. It is of a piece with the pluralism so evident in the American Constitution (and in the American law school classroom).

Much as the Azande reliance on the benge oracle in their trials reflects and reinforces reality dominated by magic, the dueling American experts reflect and reinforce an understanding of reality as democratic, that is to say, created and understood by each person according to their own lights. Each suspended in a web of his own spinning. Additionally, while a trial will be resolved by a judge or jury, the resolution will not be a determination of truth in an absolute sense, but only that one version is more probable than another.

On this view the culture and disputing method predicts that Americans will continue to reject a neutral expert regime. It also endorses that rejection because it predicts that a change in the way we

25. Langbein, *supra* note 23, at 835-36.

26. *See* DAMASKA, *supra* note 20, at 232-34 (describing continuing American attachment to "coordinate" procedural forms).

use experts at trial will eventually impact the common understanding of the nature and place of scientific authority in society generally. My personal preference for a world in which truth is contested and contestable admittedly underlies my view of the judicial process.

Procedures, then, are not only the means by which disputes are resolved. They are also a means by which we make and re-make our world and ourselves. I urge procedural engineers to keep this in mind as they re-examine and reform procedures. We must ask ourselves not only whether we create procedures that promote better accuracy and efficiency, but also whether they promote the kind of society, the kind of reality, we desire.