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A COMMENT ON CHRISTOPHER JOHNSON'S
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*Malick W. Ghachem**

Christopher Johnson has dug deeply into a neglected corner of comparative law and emerged with some fascinating and important contrasts. Finland does not appear often on the radar screen of American legal scholars, even those whose primary focus is comparative law. And so we are indebted to Johnson for reminding us that critical comparative insights can arise out of studying the experiences of nations deemed "marginal" to the international system, and to mainstream comparative law scholarship (which itself occupies a position of uncertain import in American legal scholarship generally). Johnson's findings are all the more significant because they come from one who, as the Chief Appellate Defender for the state of New Hampshire, bridges the gap between the legal academy and the practice of law, and who is deeply versed in the workings of American appellate criminal procedure.

In this brief comment, I want to try to amplify the import of Johnson's article by removing it slightly from its Finnish-American axis of origin. This approach stems from the very originality of Johnson's work, for I dare say that few comparative law scholars are conversant in the niceties of Finnish criminal law, and I am no exception. Whether Johnson's portrait of appellate criminal practice in Finland diverges from the understanding of others who have studied this topic is not a matter I am qualified to judge. This comment is nonetheless written in the faith that comparative law scholars are not destined to be forever working the isolated vineyards of their respective sub-fields. There is a larger conversation in process to which we can all contribute. If I will raise some questions about the nature of Johnson's project, it is primarily to underscore that what he has said about Finland speaks powerfully to this larger work-in-progress that is American comparative law. By its very nature, that work is collaborative: it depends on the contributions of many individual scholars, and it stands to gain both from those who deepen our existing knowledge of "mainstream" comparison and from scholars, like Johnson, who veer off the beaten path in search of the overlooked contrast or similarity.¹

What, then, has Johnson found on that less-traveled path? He has persuasively demonstrated that the American way of doing criminal appeals is not a natural or necessary result of having a criminal justice system, even one as complicated and overburdened as the American version. In Finland, appellate courts seek by and

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1. Finland's criminal justice system is not the only marker of comparison that has drawn the attention of American political and social commentators recently. See Diane Ravitch, *Schools We Can Envy*, N.Y. REV. BOOKS (Mar. 8, 2012), <http://www.nybooks.com/articles/archives/2012/mar/08/schools-we-can-envy/>.

large to ensure the substantive correctness of a criminal verdict. To this end, they permit a degree of *de novo* fact-finding on appeal that is unimaginable by current American standards. In effect, the appellant defendant has a second bite at the apple, a chance to introduce evidence not introduced below, and also to reargue the significance of testimony already heard – all in the name of persuading the appellate tribunal that justice was not done below. The corollary of this practice is that it also permits the prosecution to seek review of acquittals – a leeway given to the American prosecutor in only a very narrow class of cases, about which more below.

Johnson is careful not to overstate his comparison. He notes that, in practice, the Finnish system of *de novo* review of facts on appeal may involve a certain amount of deference to the trial court's conclusions.² (Those conclusions, Johnson explains, must be placed in writing and thus legitimated on rational grounds, in contrast to the American jury verdict, which typically requires only that the jury affirm or negate the guilt of the accused and, on occasion, verify that certain predicates of a conviction have been established). He also reminds us that, on the American side, the 6th amendment right to trial by jury does not preclude appellate courts from reviewing factual findings, and that federal habeas courts are authorized to engage in limited fact-finding on federal law claims – most notably, where evidence purporting to demonstrate actual innocence is newly discovered – even if they rarely choose to exercise that power.³

Moreover, the idea that American appellate courts focus on procedure rather than substance can itself be overplayed, as Johnson nicely underscores by characterizing the three prototypical appellate challenges of an American criminal defendant as proxy attacks on the substance of the conviction. Those three challenges – to the admission or exclusion of evidence at trial, the adequacy of defense counsel's representation, and the prosecution's pretrial compliance with the *Brady* obligation to disclose exculpatory evidence – do indeed serve as covert tests of substantive and not merely procedural justice.⁴ In each case, however, the standard for showing actual "prejudice" to the defendant is so high as to make all but the most egregious of these facially procedural violations at trial immune to appellate scrutiny.

This is perhaps particularly the case in the context of the law of prosecutorial misconduct, which remains resolutely hostile to a defendant's challenges on appeal notwithstanding some truly striking examples of *Brady* and other violations in recent years.⁵ In most cases, of course, a prosecutor's pretrial failure to disclose exculpatory evidence is only discovered *after* a conviction has been secured: that is the very nature of the violation at issue. By that time, the American rule requiring the defendant to show that a procedural violation actually prejudiced the result at trial serves as an effective bar to all claims of prosecutorial misconduct. An appellate court can scold the prosecutor for a non-prejudicial *Brady* violation, but if

2. Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 ME. L. REV. 426, 435 (2012).

3. *Id.* at 435-36, 450.

4. *Id.* at 463.

5. See, e.g., Neil A. Lewis, *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES (Apr. 1, 2009), <http://www.nytimes.com/2009/04/02/us/politics/02stevens.html?fta=y>.

the evidence of guilt is otherwise deemed adequate, a lecture is all that the prosecutor will receive, barring a secondary system of sanctions not tied to the outcome of the trial. Here, however, we must note an important limitation in Johnson's framework, which views American appellate practice through the lens of the Anglo-American tradition of trial by lay jury. In the case of prosecutorial misconduct, it is not simply the jury's discretion that the American system protects: it is also the prosecutor's.⁶ And that distinction may, in turn, suggest other ways in which the Finnish-American contrast depends on differences not only in the identity of the fact-finder, but on the powers and identities of the prosecuting officials in each system.

That said, Johnson's emphasis on the critical role of the jury in American criminal practice is surely correct. The clear implication of the "law on the books," at least, is that American appellate courts avoid *de novo* fact-finding on appeal first and foremost because of the sanctity of the jury in the Anglo-American tradition. The Finnish system, by contrast, does not seem to regard lay participation in the trial as sufficiently significant to insulate fact-finding from the interference of appellate judgment.⁷ This contrast can have a somewhat tautological character to it, since by Johnson's account the Finnish system (in all but misdemeanor cases) involves a tribunal consisting of one professional judge and three lay judges rather than a thoroughgoing lay "jury." Moreover, American appellate courts justify their tradition of deference to the jury in functional and not simply categorical terms: juries are better equipped, our appellate judges tell us, to judge such intangibles as the credibility of witnesses.⁸ Finally, the issue of whether the American hostility to *de novo* appellate review stems from the jury tradition *per se*, as opposed to instrumental concerns about efficiency, is an open one, as Johnson acknowledges.⁹ Nonetheless, Johnson's point that history, not logic, has shaped the current makeup of these criminal justice systems seems absolutely right – both as an abstract proposition, and also as a characterization of what makes contemporary American criminal justice "tick."

What then ought we to make of this contrast as a normative matter? Johnson does not push the normative implications as aggressively as he could, preferring to allow his comparison to tell the normative story instead (a refreshing departure from at least some currents in legal scholarship). For those concerned with the rights of criminal defendants, the case for the Finnish approach seems unimpeachable. There are simply more opportunities to challenge a conviction "on the merits," more chances to get right on appeal what defense counsel might have somewhat mishandled or overlooked at trial, without having to worry about the obstacles created by the American law on ineffective assistance of counsel. As Erwin Chemerinsky relates, Yale law professor Dennis Curtis exaggerated only slightly when he observed that, under the leading case of *Strickland v. Washington*, "an attorney will be found to be adequate so long as a mirror put in front of him or

6. See generally ANGELA J. DAVIS, *THE POWER OF THE AMERICAN PROSECUTOR* (2007).

7. Johnson, *supra* note 2, at 472.

8. *Id.* at 472-73.

9. *Id.* at 473-74.

her at trial would have shown a breath.”¹⁰ Defendants in Finland do not have to worry about rules like the *Strickland* standard because the ability to reopen factual issues on appeal makes those rules superfluous.

Of course, not everyone who cares about the state of American criminal justice has a special concern for the rights of criminal defendants. That is as it should be: victims ought to have influential and vocal advocates, as should the interests of law enforcement and public safety. But an increasing number of commentators, from all points on the political spectrum, are concluding that the American way of doing criminal law is relatively (and in some ways needlessly) harsh when it comes to criminal suspects and offenders.¹¹ To these observers, the Finnish preference for flexibility in criminal appeals might seem like an obvious antidote. But as Johnson’s account reminds us, in criminal justice the phenomenon of discretion can cut both for and against the interests of defendants. The very flexibility that makes Finland’s appellate procedure seem more favorable to defendants also gives prosecutors authority they do not have in the American system. In Finland, the prosecution can appeal acquittals. Under federal law, American prosecutors may do so only where an acquittal results from the allowance of a defendant’s motion to set aside a jury verdict for insufficient evidence (a so-called “Rule 29 motion”).¹² In all other circumstances, an acquittal – whether by the jury or on a pre-verdict Rule 29 motion – will normally put an immediate and absolute end to the prosecution’s case.

It would be interesting to have an empirical sense of how often prosecutors appeal convictions in Finland, and how often they are successful in doing so. Whatever the actual numbers may be, this revealing difference between American and Finnish appellate procedure ought to give us at least some pause before concluding that either system is clearly more favorable to defendants than the other. My very first case as a practicing lawyer was a federal tax fraud prosecution that ended on a (successful) pre-verdict Rule 29 motion. I still remember the powerful feeling of finality that accompanied the trial judge’s announcement of his decision: for all of the government’s power to investigate and prosecute crime, there was simply nothing more to be done by either side. The parties shook hands, and the two defendants thanked their legal teams before walking out of the courthouse as free men, never again to be burdened by the imposing weight of the justice system. Finality in criminal adjudication is a two-way street.

Of course, most criminal cases do not end on successful Rule 29 motions, and we have come very far indeed from the day when American juries regularly acquitted criminal defendants, as they seem to have done in the Gilded Age that William Stuntz describes so powerfully in his recent book *The Collapse of American Criminal Justice*.¹³ Looking back at that era from our present-day vantage point, it is difficult to deny that Johnson’s overall comparison captures a very large part of the world of American criminal justice. And yet, certain aspects

10. 466 U.S. 668 (1984); ERWIN CHERMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* 144 (2010).

11. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); JAMES Q. WHITMAN, *HARSH JUSTICE* (2005); DAVID COLE, *NO EQUAL JUSTICE* (1999).

12. FED.R. CRIM. P. 29.

13. STUNTZ, *supra* note 11, at 30.

of the twentieth-century evolution of American criminal law make me wonder if there is not more to be said about that comparison. Three such aspects are worth noting.

First: the significance of procedure in American criminal justice. Johnson notes that the Finnish trial system is less procedurally dense than the American system.¹⁴ But the proceduralization of American criminal law is the product of a relatively quite recent chapter of American constitutional history – the Warren Court criminal procedure “revolution” of the 1950s and 1960s – not the “deep history” that Johnson describes in Part Two of his article.¹⁵ Are we dealing, in other words, with a larger and more general contrast between a Finnish preference for litigation on the merits and an American penchant for procedural thickness, a contrast that is essentially independent of the nature of direct appellate or habeas corpus review *per se*?¹⁶

Second: the disposability of American appellate review. For all of our cultural fascination with the criminal trial, criminal appeals, and the Supreme Court, one wonders whether most Americans are aware that there is nothing in the Federal Constitution that prevents a state from abolishing all criminal appellate process altogether. So said the Supreme Court in 1894, and so has it affirmed on multiple occasions since then.¹⁷ What would Johnson make of this American option to do away with the appeal altogether? Would Finland’s criminal justice system tolerate this drastic scenario? Is this the ultimate contrast in the American and Finnish appellate cultures, the contrast that would swallow all of the other (finer) distinctions that Johnson so painstakingly draws? What is the good of a system as plentifully endowed with procedural protections, as ours is, that can be short-circuited in this way? The question may seem hypothetical in the extreme, but as Stuntz has shown so persuasively, we err in assuming that our current ways of criminal (and appellate) litigation are set in stone, destined to remain unchanged forever.

Third: the relatively complex and developed nature of the law of evidence in the United States. Johnson notes that Finland adheres to a system of free judicial evaluation of the evidence. The American law of evidence, by contrast, is highly convoluted, full of loopholes and exceptions, counter-intuitive rules that appeal to intuition only to end up subverting it: in short, a mystery even to some of our most skilled jurists, even after it was codified in the Federal Rules of Evidence during the 1960s and 1970s. That difference, incidentally, is related in important ways to the story of judicial torture in continental Europe. As John Langbein has

14. Johnson, *supra* note 2, at 452-54.

15. On the Warren Court procedure revolution, see, STUNTZ, *supra* note 11, at 216-43. This part of Stuntz’s book has met with some strongly felt criticisms. See, e.g., John Paul Stevens, *Our “Broken System” of Criminal Justice*, N.Y. REV. OF BOOKS (Nov. 10, 2011), <http://www.nybooks.com/articles/archives/2011/nov/10/our-broken-system-criminal-justice/>.

16. Of course, even this contrast between “substance” and “procedure” must be qualified. Is the prosecution’s *Brady* obligation to produce exculpatory evidence a matter of factual innocence/guilt or a procedural function? Johnson notes that substance and procedure are intertwined in the Fourth Amendment context. Johnson, *supra* note 2, at 462 & n.276. The point holds equally for non-Fourth Amendment rules like *Brady*.

17. See *McKane v. Durston*, 153 U.S. 684, 687 (1894); *Halbert v. Michigan*, 545 U.S. 605, 610 (2005).

explained, judicial torture went away in seventeenth-century Europe when the Roman-canon law of proof began no longer to require either a confession or the testimony of two witnesses.¹⁸ The inquisitorial system that emerged in torture's aftermath was a system of free evaluation of the evidence: free at the trial stage, which makes very little use of the exclusion of evidence, and (eventually, with the modern development of formal appellate institutions and procedures) free at the appellate stage as well.¹⁹ By contrast, the Anglo-American tradition, which largely escaped the use of judicial torture in the medieval and early modern periods, has a much more constricted notion of what constitutes legitimate evidence at trial. American criminal trials, when they are not averted by plea bargains, are largely contests over the application of the rules of evidence. And the American system has a correspondingly narrow understanding of what evidentiary matters can be raised on appeal. This, too, is a difference in legal culture that transcends appellate review *per se*.

Where the law of evidence and the American criminal trial intersect, of course, one evidentiary rule occupies pride of place: the exclusionary rule, that quintessential product of the twentieth-century constitutionalization of criminal law in the United States. Johnson concludes his article by suggesting that our deference to jury fact-finding on appellate review reflects a compromise with the goal of accuracy.²⁰ That seems correct. But isn't such compromise also the nature of American rules that have nothing to do with appellate procedure *per se*, most notably the exclusionary rule? If so, then it is worth asking (again) to what extent the bold contrast that Johnson draws is inherent in the American way of thinking about the appellate process specifically, as opposed to criminal justice as a whole.

These are, however, relatively minor questions and critiques of a superlative study that deserves the attention of a broad audience of comparative lawyers and students of criminal justice. Johnson has done what the best comparative law does: hold up a mirror to ourselves so that we can see aspects of our present-day legal culture in a more focused and revealing light. His concluding suggestion that the American emphasis on efficiency and public confidence in post-conviction review is inseparable from our over-investment in mass or hyper-incarceration is alone worth the price of admission and suggests an important line of research that might profitably be undertaken. Do such key markers of American post-conviction review as the prevalence of waiver doctrine or the generally deferential standard of review correlate not simply with our commitment to the Anglo-American tradition of trial by jury, but also with the dramatic growth in the American prison population beginning in the 1970s and then exploding in the 1990s and 2000s? Johnson has posed this and many other provocative and important questions. For asking these questions, and for sharing a fascinating and overlooked story of comparative law along the way, we are all greatly in Professor Johnson's debt.

18. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 4, 45 (1977).

19. Johnson, *supra* note 2, at 454.

20. *Id.* at 473.